

Volume 3

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Orrick, Judge

UNITED STATES OF AMERICA,

Plaintiff,

VS.

BAZAARVOICE, INC.,

Defendant .

NO. C 13-00133 WHO

San Francisco, California
Wednesday, September 25, 2013

TRANSCRIPT OF PROCEEDINGS

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8:00 a.m.

P R O C E E D I N G S

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THE COURT: Good morning, everybody. Please be seated.

So I understand we have some scheduling issues to discuss.

MR. JACOBSON: Yes. I don't think it's a major complication, Your Honor; but the Government's case has been going, I think, a little faster than they had anticipated and they have elected to put on a rebuttal case, which, of course, is their right.

So the upshot of that is that we may have a little white space in tomorrow's hearing. We'll try to avoid that, both sides will try to avoid that; but the upshot also is that because there's so many nonparty witnesses who have date-certain commitments, that to ensure completion of the trial, we may need some time in the afternoon of the last Thursday.

Now, on the Court's calendar we know there's a change of plea that day. There did not appear to be anything else on the calendar. We could certainly go after the change of plea if that is something that is available to the Court.

THE COURT: Sure. And which are we talking about, Thursday in the third week or Thursday --

MR. JACOBSON: Yes, the very last week.

1 **THE COURT:** Yes. I can be -- I'm flexible. Thursdays
2 right now are relatively short in the afternoon, so we could
3 come back at 2:30 or something like that.

4 **MR. JACOBSON:** We will do -- both sides will do our
5 best to avoid that and proceed on the basis that we've been
6 proceeding on; but if necessary, we would like to reserve that
7 time.

8 **THE COURT:** Absolutely. And, you know, if there's --
9 if the case is going a little quicker and we need flexibility
10 with witnesses, that's fine.

11 **MR. JACOBSON:** Thank you, Your Honor.

12 **MR. BONANNO:** Good morning, Your Honor.

13 **THE COURT:** Mr. Bonanno.

14 **MR. BONANNO:** The United States calls Mr. Luedtke back
15 to the stand.

16 **MR. FELDMAN:** They're fetching him. He was in
17 storage.

18 **THE COURT:** Okay.

19 (Pause in proceedings.)

20 **PEHR LUEDTKE,**
21 called as a witness for the Plaintiff, having been previously
22 duly sworn, testified further as follows:

23 **THE WITNESS:** Good morning.

24 **MR. BONANNO:** Good morning.

25 **THE WITNESS:** Good morning, Your Honor.

1 **THE COURT:** Mr. Luedtke.

2 (Pause in proceedings.)

3 **THE COURT:** Please proceed.

4 **MR. BONANNO:** Thank you.

5 **REDIRECT EXAMINATION**

6 **BY MR. BONANNO:**

7 **Q.** Good morning, Mr. Luedtke.

8 **A.** Good morning.

9 **Q.** I'd like to start this morning with an exhibit that your
10 counsel showed you yesterday during his examination. It's
11 Defense Exhibit 1865. We're going to go to page 5.

12 Seth, can you please put that on the screen?

13 **A.** (Witness examines document.)

14 **Q.** One more page I think, Seth.

15 Now, Mr. Luedtke, during your counsel's examination
16 yesterday, you talked about this slide something called the
17 "Hype Cycle"; is that right?

18 **A.** Correct.

19 **Q.** And we talked about the trough of disillusionment; is that
20 right?

21 **A.** Correct.

22 **Q.** And we also talked about the slope of enlightenment.

23 And this Hype Cycle, you testified yesterday, is something
24 that's created by Gartner, the analyst firm; is that right?

25 **A.** Yes.

1 Q. And you testified that Gartner is a well-known analyst for
2 technology for enterprises; correct?

3 A. Correct. Yeah.

4 Q. So Gartner issues reports analyzing technologies that
5 businesses use; is that right?

6 A. Correct.

7 Q. Did PowerReviews pay a subscription fee to purchase access
8 to these Gartner reports?

9 A. I believe at this time we did, yes.

10 Q. And you read these Gartner reports when you were CEO of
11 PowerReviews?

12 A. Yes.

13 Q. And you considered this Gartner Hype Cycle when you were
14 in merger discussions with PowerReviews -- or, excuse me.
15 Strike that.

16 You considered the Hype Cycle when you were in merger
17 discussions with Bazaarvoice; is that right?

18 A. Yeah. As we discussed yesterday, we used this sort of as
19 a way to think about a rationale for combination, and this was
20 sort of a nice grounding principle we could both discuss.

21 Q. Now, I believe you testified yesterday that you saw the
22 merger as an opportunity to move out of the trough of
23 disillusionment and into the area of the curve entitled "Slope
24 of Enlightenment"; is that right?

25 A. Yeah. Specifically I think what we talked about was we

1 had started to go down from the -- slope down from the peak of
2 inflated expectations on that downward slope towards the trough
3 of disillusionment. We never talked about whether or not we
4 were in the trough of disillusionment from my recollection. We
5 just used this as that we were on that downslope.

6 **Q.** Okay.

7 **A.** And the point of the merger or one of the benefits of
8 combination was to move, you know, to the right pretty quickly
9 and avoid parts of the trough of disillusionment.

10 **Q.** Oh, I see. So you wanted to skip past the trough of
11 disillusionment and onto the slope of enlightenment; is that
12 right?

13 **A.** We wanted to move from the downward slope to the upward
14 slope.

15 **Q.** And the downward slope on the Hype Cycle at the top,
16 that's the field that's labeled "Competition"; right?

17 **A.** Yeah. Yes.

18 **Q.** So you wanted to skip past the stage of the Hype Cycle
19 labeled "Competition" and onto the slope of enlightenment; is
20 that right?

21 **A.** Well, specifically we wanted to avoid this period, as
22 Gartner explains it, of intense competition and occasionally
23 price compression and lots of other people coming into the
24 marketplace and move towards the slope of enlightenment where
25 we thought, at least at the time, we could access these larger

1 budgets in advertising and social and analytics. And that was
2 sort of the framework for this discussion.

3 **MR. BONANNO:** Your Honor, may I approach the witness?

4 **THE COURT:** Certainly.

5 (Pause in proceedings.)

6 **MR. BONANNO:** Your Honor, the document that's been
7 handed up to the Court and to the witness was provided by the
8 defense. It was originally Defense Exhibit 1850, but it hasn't
9 been offered yet, so we're going to give it a Government
10 Exhibit Number, 1213.

11 (Plaintiff's Exhibit GX1213 marked for identification)

12 **MR. BONANNO:** Seth, can you put it on the screen?

13 **Q.** Now, Mr. Luedtke, the title of this document reads, "Hype
14 Cycle for Business Use of Social Technologies, 2011." Do you
15 see that, sir?

16 **A.** Uh-huh.

17 **Q.** And this was a report that was published by Gartner;
18 correct?

19 **A.** Correct.

20 **Q.** And this is the same Gartner that came up with the Hype
21 Cycle that appeared on the last exhibit we were looking at;
22 correct?

23 **A.** Correct.

24 **Q.** Okay. And this report was published in August of 2011?

25 **A.** Correct.

1 Q. Okay. I'd like to turn first to page 6.

2 A. (Witness examines document.)

3 Q. Are you there, Mr. Luedtke?

4 A. Yeah, uh-huh.

5 Q. Mr. Luedtke, is this the Hype Cycle that appeared in the
6 last exhibit in the PowerReviews Board of Directors
7 presentation that we were looking at?

8 A. Just for clarity, what we just looked at was not a Board
9 of Directors presentation.

10 Q. Oh, I'm sorry.

11 A. It was the documents we reviewed in Austin.

12 Q. Okay. Is this Hype Cycle the same diagram that was on
13 that slide?

14 A. It's the same curve, yeah, without all the companies.

15 Q. Okay. I'd like to turn to page 57, please.

16 A. (Witness examines document.)

17 Q. Are you there, Mr. Luedtke?

18 A. Uh-huh.

19 Q. And there's a section entitled "Community Reviews." Do
20 you see that?

21 A. Yeah.

22 Q. In the definition section the report reads: (reading)

23 "Community review technologies allow the retailer to
24 capture customer opinions of products and services that
25 are sold by the retailer. The implementations typically

1 allow for ratings such as 1 to 5 stars as well as reviews
2 where the customer describes his or her opinion of the
3 product by tagging the product with a set of suggested
4 attributes. This is done by a moderated platform where
5 moderation happens either manually or automatically by
6 business rules and filters that are applied."

7 Did I read that correctly?

8 **A.** Correct. Yes.

9 **Q.** This is the Gartner description of product
10 ratings-and-reviews platforms; correct?

11 **A.** Well, specifically it's their description of community
12 reviews, but I think it refers to product reviews from the
13 wording here.

14 **Q.** I'm sorry?

15 **A.** It -- they call it "Community Reviews." It is essentially
16 a description of ratings and reviews as we would define it.

17 **Q.** So the PowerReviews rating-and-reviews product would fall
18 into the Gartner community reviews category?

19 **A.** Yes. Exactly.

20 **Q.** Okay. I'd like to flip back now to page 6, and I'm going
21 to direct your attention, Mr. Luedtke -- it's a little bit
22 small on the screen.

23 Seth, can we blow up the "slope of enlightenment" on the
24 right-hand side there?

25 We're going to look at the third dot from the left.

1 **A.** Uh-huh.

2 **Q.** That reads "Community Reviews"; right?

3 **A.** Uh-huh.

4 **Q.** So Gartner considered product ratings and reviews in
5 August of 2011 to have already past the trough of
6 disillusionment; isn't that right?

7 **MR. FELDMAN:** Objection. No foundation.

8 **THE WITNESS:** From --

9 **THE COURT:** It's overruled. He can speak to his
10 understanding of the graph.

11 **THE WITNESS:** Yeah. That's what this articulates.
12 That was Gartner's impression of their industry, yes.

13 **BY MR. BONANNO:**

14 **Q.** And you had testified yesterday that when you met with
15 Bazaarvoice representatives in December of 2011 at Menlo
16 Ventures, you discussed the impact that the elimination of
17 competitive discounting would have on the operations of the two
18 firms; correct?

19 **A.** It was one of the things we discussed in the context of
20 the combination.

21 **Q.** And that was four months after this report was published;
22 correct?

23 **A.** Four months, yeah.

24 **Q.** Mr. Luedtke, Gartner also issued another report that
25 predated this one in which it concluded that PowerReviews and

1 Bazaarvoice competed in a duopoly; isn't that right?

2 **A.** I remember those words, yes.

3 **MR. BONANNO:** Okay. Your Honor, may I approach the
4 witness?

5 **THE COURT:** Yes.

6 (Pause in proceedings.)

7 **MR. BONANNO:** Seth, can we put up GX271 on the screen,
8 please?

9 **Q.** Mr. Luedtke, I'll direct your attention to the top of
10 Exhibit 271, the cover email. This is an email that you
11 received from Nadim Hossain in July of 2011; is that right?

12 **A.** That's correct.

13 **Q.** And Mr. Hossain was the PowerReviews VP of marketing;
14 correct?

15 **A.** Yes, that's correct.

16 **Q.** Go ahead and turn to, I believe the actual report starts
17 on page 3.

18 **A.** (Witness examines document.)

19 **Q.** Mr. Luedtke, this is a Gartner report analyzing
20 PowerReviews that was published in May of 2011; is that right?

21 **A.** Yes, that's correct.

22 **Q.** And this is the same Gartner that created the Hype Cycle
23 that you discussed with Bazaarvoice when you met to have merger
24 discussions; is that right?

25 **A.** Uh-huh.

1 Q. The same Hype Cycle that you discussed yesterday during
2 your counsel's examination?

3 A. That's correct.

4 Q. Okay. Mr. Luedtke, I'd like you to turn to page 10 of the
5 report.

6 Seth, I think it's page 12 in the overall exhibit.

7 A. (Witness examines document.)

8 Q. And I'll focus your attention, sir, on the bottom of the
9 page under "Recommendations."

10 A. (Witness examines document.)

11 Q. Are you there, Mr. Luedtke?

12 A. I am, yeah.

13 Q. I believe this is the second sentence of the paragraph
14 with a bullet point that reads: (reading)

15 "The market can largely be considered a duopoly with
16 the market being split between Bazaarvoice and
17 PowerReviews."

18 Did I read that correctly?

19 A. Yes.

20 Q. And this was a statement made in the Gartner report;
21 correct?

22 A. Correct.

23 Q. Mr. Luedtke, Gartner also issued a report discussing
24 Bazaarvoice and PowerReviews after the transaction; didn't it?

25 A. I don't remember; but if -- I don't remember that; but if

1 they did, I'd love to see it. I don't remember.

2 **MR. BONANNO:** Okay. Your Honor, may I approach?

3 **THE COURT:** Yes.

4 **MR. BONANNO:** Seth, can we please put GX646 on the
5 screen? And we can skip past the cover email. I believe we
6 can go to page 3 of the document.

7 **THE WITNESS:** (Witness examines document.)

8 **BY MR. BONANNO:**

9 **Q.** Mr. Luedtke, this is a Gartner report issued after the
10 transaction; correct?

11 **A.** Yeah. The reason why I paused earlier, the way Gartner
12 does it, they have reports. This is a report (indicating).
13 This is actually a note (indicating). So you can see at the
14 top it's a research note that they say. That's -- I apologize
15 for my confusion.

16 **Q.** I see. So this is a Gartner research note --

17 **A.** Correct.

18 **Q.** -- that was published after the acquisition?

19 **A.** That's exactly right.

20 **Q.** Did you also read Gartner research notes when you were CEO
21 of PowerReviews?

22 **A.** When I was CEO, I don't recall reading this one, but I may
23 have.

24 **Q.** But you read other ones like this?

25 **A.** Absolutely, yes.

1 Q. Sir, I'd like you to turn to the second page of the report
2 and I'll direct your attention to the second sentence of the
3 second full paragraph, and the report reads: (reading)

4 "There is considerable overlap between the two
5 companies' product review capability; thus, Gartner
6 believes the main purpose of this deal is taking
7 Bazaarvoice's main competitor out of the market and
8 creating another offering targeting a new audience of
9 small and midsize businesses."

10 Did I read that correctly, sir?

11 A. Yes.

12 Q. I direct your attention, sir, under "Recommendations" on
13 the same page, the second bullet point, which reads: (reading)

14 "Current and Prospective PowerReviews Customers:
15 Prepare for potential migration to Bazaarvoice products
16 and potential price increases based on Bazaarvoice's need
17 to cover the cost of this transition and historically
18 higher-priced offerings."

19 Did I read that correctly, sir?

20 A. Yes.

21 Q. And this was a Gartner research note published by the same
22 Gartner that created the Hype Cycle you used to discuss the
23 impact of competitive discounting when you met with Bazaarvoice
24 to discuss a potential merger; correct?

25 A. Correct.

1 Q. Now, Mr. Luedtke, Bazaarvoice's price was historically
2 higher than PowerReviews'; correct?

3 A. That is correct.

4 MR. BONANNO: Your Honor, at this time I'd like to
5 offer GX1213, GX271, and GX646 into evidence.

6 THE COURT: Any objection?

7 MR. FELDMAN: Yes, absolutely, Your Honor. We
8 objected when these were designated before.

9 The reports are both hearsay and they did not establish
10 base. They did not authenticate them. And, more importantly,
11 they contain hearsay and the views within them are hearsay.
12 They could have deposed the authors, they're listed there, and
13 they didn't.

14 So although I had no objection to asking the witness his
15 views on them, they can't be admitted into evidence.

16 MR. BONANNO: Your Honor, yesterday counsel walked the
17 witness through the witness' use of the Gartner Hype Cycle in
18 analyzing the merger. He opened the door to the discussion of
19 these reports, and I think we've established a foundation for
20 their admission.

21 THE COURT: Well, let's take them one at a time.

22 The foundation for 1213, which is the report, is what?

23 MR. BONANNO: Well, I don't understand the objection
24 to 1213 because it was a defense exhibit that was going to be
25 offered; but I think that Mr. Luedtke established that he

1 reviewed these reports.

2 And if I'm understanding counsel correctly, it's a hearsay
3 objection that's being made, and the reports really aren't
4 being offered for their truth. They're being offered as these
5 are the reports and what Gartner said at the time, and
6 Mr. Luedtke has testified that he reviewed these reports when
7 he was CEO.

8 **MR. FELDMAN:** What he just said, the words fit
9 together in a sentence but they made no sense. He said,
10 "They're not being offered for the truth of the reports.
11 They're just being offered for what Gartner said."

12 Well, that is the truth of the reports. He's offering
13 them because he wants into evidence the views of some Gartner
14 analyst on the market and on the merger, and he absolutely
15 could have taken their deposition and tried to build a record.

16 But to put in -- and this is no different than the
17 analyst's report yesterday from BMO where when we objected,
18 counsel withdrew the document.

19 It's not a question of did he look at it. A witness can
20 look at something and have referred to it, but that doesn't
21 cure the hearsay nature of the document.

22 **THE COURT:** Well, I'm going to overrule that objection
23 and allow this for the limited purpose that Mr. Bonanno
24 described because this witness did look at it. It does help
25 explain the chart that -- the slough [sic] of disillusionment,

1 which I was quite interested in yesterday. So I'm going to
2 allow that one.

3 (Plaintiff's Exhibit GX1213 received in evidence)

4 **THE COURT:** 646 -- or, no. 271. I'm sorry. 271 was
5 attached, it looks like, to an email to Mr. Luedtke; is that
6 correct?

7 **MR. BONANNO:** That's right, Your Honor.

8 **THE COURT:** So I'm going to allow that, again, for the
9 same purpose.

10 (Plaintiff's Exhibit GX271 received in evidence)

11 **THE COURT:** And then 646. I have a different problem
12 with 646 because I think Mr. Luedtke said that he didn't know
13 whether he had looked at it before, and I'm not sure who the
14 "to" and the "from" is on this. So I have a concern about
15 admitting this document.

16 **MR. BONANNO:** Your Honor, I would also like to raise
17 that by stipulation the parties have stipulated away any
18 hearsay objection for documents that have been produced. It's
19 only for good cause shown under the stipulation that you can
20 object to the admission of exhibits that have been produced by
21 either side pursuant to either a document request or subpoena
22 in this matter.

23 **MR. FELDMAN:** That was to get around routine business
24 records objections so we didn't waste your time where things
25 came from the files. They're not offering it to show that

1 someone within PowerReviews or Bazaarvoice had the document.
2 They're offering it because they want the substance of what
3 Gartner said to be into evidence.

4 **THE COURT:** I understand what your concern is,
5 Mr. Feldman; but -- so I'm -- and I'll go back and look at the
6 stipulation, but with 646 I still don't see the foundation for
7 it coming in with this witness.

8 **MR. BONANNO:** Well, I think the foundation would be
9 that Mr. Luedtke had testified that he considered these types
10 of materials when he was CEO and he reviewed them.

11 This came from the Bazaarvoice files of the company, as
12 the cover email clearly indicates, and it's just like the other
13 reports, not being offered for the truth so much as this is
14 what Gartner said and what Gartner thought based on its view of
15 the market.

16 **THE COURT:** I don't think there's an adequate
17 foundation for this document, so I'm not going to allow this
18 one in. I will look at the hearsay issue that you raised and I
19 can -- but at the moment these are admitted.

20 **MR. FELDMAN:** Thank you, Your Honor.

21 **MR. BONANNO:** Thank you, Your Honor.

22 **Q.** Mr. Luedtke, during your examination yesterday by your
23 counsel, I recall that he also asked you some questions about
24 your use of the word "duopoly." Do you remember those?

25 **A.** I do.

1 Q. And you had testified that you used the word "duopoly"
2 because Bazaarvoice was number one and PowerReviews was number
3 two; correct?

4 A. I think I testified that I used it as a sort of
5 simplifying phrase to describe that there were two major sort
6 of players in the outsource rating-and-reviews market and it
7 benefited my company to sort of draft off the number one.

8 Q. And during your tenure as CEO of PowerReviews, was it your
9 understanding that Bazaarvoice was the number one provider of
10 outsource ratings and reviews in the IR500?

11 A. As defined by the Internet 500, they had the most clients,
12 yes, and they were also -- from what all of the data suggested
13 to me, they were a much larger company in terms of revenue.

14 Q. And based on that same metric, looking at the IR500,
15 PowerReviews was the number two provider; correct?

16 A. That's correct.

17 Q. All right, Mr. Luedtke, I'd like to turn to Defense
18 Exhibit 513 which your counsel showed you yesterday.

19 Seth, can you please put that on the screen?

20 We're just going to focus on this first slide.

21 A. (Witness examines document.) All right. I've got it.

22 Q. Got it, Mr. Luedtke?

23 A. Yeah, I've got it.

24 Q. Okay. I believe you testified during counsel's
25 examination yesterday that you prepared this slide sometime in

1 April of 2012; right?

2 **A.** Yeah. It was April -- May, April 2012. March, April, May
3 2012. I don't remember the specific time. You probably have
4 it on email as to when I sent it, so....

5 **Q.** Okay. Well, let's look at the second bullet point that
6 lists a number of companies, and I'd like to just walk through
7 them.

8 I think we're all well familiar with Bazaarvoice, so we'll
9 skip over that one for now.

10 Lithium. Mr. Luedtke, what's your understanding of how
11 many ratings-and-reviews customers Lithium has today?

12 **A.** I don't know.

13 **Q.** What about Gigya, how many ratings-and-reviews customers
14 do they have today?

15 **A.** Again, as I discussed yesterday, I don't know.

16 **Q.** And Badgeville actually doesn't have any
17 ratings-and-reviews customers; do they?

18 **A.** They don't offer that service.

19 **Q.** And I also see that eCommerce platforms are listed there?

20 **A.** Uh-huh.

21 **Q.** Mr. Luedtke, isn't it right that PowerReviews Express
22 offered additional functionality beyond that that's offered by
23 eCommerce platforms with their native ratings-and-reviews
24 functionality?

25 **A.** I'm sorry. Beyond? I don't understand. Beyond what?

1 Q. So some eCommerce platforms have some limited ratings and
2 reviews; is that right?

3 A. Many eCommerce platforms have a basic sort of stars and
4 text box offering that companies can use as their
5 ratings-and-reviews solution.

6 Q. Uh-huh. And isn't it true that PowerReviews Express
7 offered additional functionality beyond that a customer could
8 get from this native eCommerce platform functionality?

9 A. Beyond what the eCommerce platforms offered, yeah. Yes,
10 we did.

11 Q. And the PowerReviews Enterprise platform had even more
12 features than PowerReviews Express; right?

13 A. Correct.

14 Q. And PowerReviews Express was the PowerReviews product that
15 was focused on small retailers; correct?

16 A. Yeah. It was -- specifically it was a self-serve product
17 which required no implement -- like no implementation. It was
18 paid on a monthly basis primarily with a credit card.

19 Q. So the retailer could just sign up with a credit card from
20 the PowerReviews Web site; right?

21 A. PowerReviewsExpress.com Web site, correct.

22 Q. And the price was a hundred bucks a month?

23 A. There were tiers. You know, my memory is not good enough
24 to remember exactly what it was, but we had tiers that I think
25 went up to probably around that.

1 Q. So it was much less expensive than PowerReviews Enterprise
2 platform; right?

3 A. Typically, yes.

4 Q. Now, when discussing Defense Exhibit 513 yesterday in
5 response to your counsel's questioning, I believe you also
6 testified about how PowerReviews was adding additional features
7 to its product at this time; is that right?

8 A. We had already announced, I think by the time when this
9 document was done, a significant -- we had announced our
10 Essential Social Suite that we discussed yesterday.

11 Q. And, Mr. Luedtke, ratings and reviews were still the
12 foundation of the Essential Social Suite; isn't that right?

13 A. Tell me more what you mean by "foundation." It was one
14 of -- it was our core product. It was what we were known for
15 in the marketplace. So I think in that regard, yes, it was
16 probably the foundation.

17 Q. So the PowerReviews core product was the
18 ratings-and-reviews product?

19 A. As defined by number of implementations in the
20 marketplace, yes, it was, because that was our history.

21 Q. Almost all PowerReviews' clients purchased the company's
22 ratings-and-reviews product?

23 A. Yes. Correct.

24 Q. Now, Mr. Luedtke, I believe during yesterday's examination
25 with your counsel, you'd also testified about a "blue ocean"

1 strategy. Do you remember that?

2 A. I do.

3 Q. And you said that this strategy was to focus less on
4 competing directly with Bazaarvoice and move down to the
5 midmarket; is that right?

6 A. I think specifically what I testified yesterday is I
7 talked about "blue ocean" being finding untapped demand in new
8 market spaces, and "red ocean" as comparison is, like, existing
9 product with existing suppliers.

10 The product strategy that we sort of formed based on that,
11 you know, that book was to go to sell the Social Suite
12 primarily to the midmarket's chief marketing officer.

13 Q. If you go in your binder, Mr. Luedtke, to Government
14 Exhibit 245.

15 And, Seth, could you put that on the screen?

16 A. (Witness examines document.)

17 Q. Okay. Looking at that first page of Government
18 Exhibit 245, Mr. Luedtke, this is an email that you sent to
19 Andy Chen in August of 2011; is that correct?

20 A. Correct.

21 Q. And Mr. Chen was a cofounder of PowerReviews; right?

22 A. That's correct.

23 Q. And he was an executive at PowerReviews at the time you
24 sent this email?

25 A. Yes, he was.

1 Q. Okay. Let's turn to the next page.

2 And, Seth, can you zoom in at the top?

3 Mr. Luedtke, this is a set of notes you prepared for a
4 meeting of the PowerReviews management in 2011; correct?

5 A. Correct.

6 Q. It was August 2011; right?

7 A. August 2011, yes.

8 Q. Okay. I'd like to look at item 9b.

9 Seth, can you scroll down a little bit? And maybe it's on
10 the next page. My apologies.

11 And you wrote: (reading)

12 "We need to play our own game (find our own 'blue
13 ocean'), through the following ways."

14 And there's a number of bullet points. Is that the "blue
15 ocean" strategy you were testifying about yesterday?

16 A. I don't mean to pause. The bullets i, ii, iii, iv, were
17 not actually the products -- the specific product strategy that
18 we embarked on. These were my thoughts, which is why I say not
19 to be shared with the larger team because the whole purpose was
20 a discussion where we could actually align as a team on a new
21 product strategy. These were some thoughts that I had going in
22 as potential options. We actually shied away from several.

23 Q. But that's the same "blue ocean" concept that you
24 discussed yesterday?

25 A. Yes. Yes. That's correct.

1 Q. Okay. I'd like to turn back to page 2 of your notes, and
2 we can look at item 2ai; and, you know, item 2 it looks like
3 you're outlining the PowerReviews strategy for the SaaS
4 business in 2011; is that right?

5 A. Yes, that's correct.

6 Q. And if we look at subbullet a, subbullet i, you wrote:
7 (reading)

8 "Break our competitor's network effect with brands."

9 Did I read that correctly?

10 A. Yes, you did.

11 Q. You were referring to Bazaarvoice's network effect?

12 A. Correct.

13 Q. If we look down at number 4, subbullet bi, you wrote:
14 (reading)

15 "Competitive network effect stronger than
16 anticipated."

17 Did I read that correctly?

18 A. Yes.

19 Q. And you were referring to the Bazaarvoice network effect
20 again?

21 A. Correct.

22 Q. So is it accurate to say that this was your assessment
23 towards the end of the year that it was harder to break the
24 Bazaarvoice network effect than you anticipated?

25 A. Yes, it was.

1 Q. So, in fact, sir, isn't it true that your "blue ocean"
2 strategy was driven by your inability to break through the
3 Bazaarvoice network effect?

4 A. In part. It was also in part, as I think we discussed
5 yesterday, in part this recognition from the marketplace that
6 this, you know, wave of social market that we were dealing with
7 was difficult, ambiguous, and they needed somebody to help
8 figure it out and they also needed integration across multiple
9 product offerings.

10 So in part, yes, it was very hard to compete with, as we
11 talk about, with Bazaarvoice on their network effect and their
12 syndication model. There were other factors clearly that went
13 into, you know, our "blue ocean" strategy.

14 Q. And the "blue ocean" strategy, if I understand it
15 correctly, was to add additional features and to shift the
16 focus on the midmarket chief marketing officer. Is that what
17 you've testified?

18 A. Yes. The best articulation was that board deck that we
19 went through yesterday where I think that was pretty much
20 exactly how we articulated it.

21 Q. But despite this "blue ocean" strategy, PowerReviews
22 continued to compete with Bazaarvoice; correct?

23 A. Yes, we did.

24 Q. And, in fact, immediately before the merger, PowerReviews
25 was competing with Bazaarvoice in many accounts; isn't that

1 right?

2 **A.** Correct.

3 **MR. BONANNO:** Your Honor, may I approach the witness?

4 **THE COURT:** Yes.

5 (Pause in proceedings.)

6 **MR. BONANNO:** Seth, can you please put Government
7 Exhibit 797 on the screen?

8 **Q.** Mr. Luedtke, I'll direct your attention to the email at
9 the bottom of the first page of Government Exhibit 797. This
10 is an email from Nadim Hossain to Ken Com   in May of 2012; is
11 that right?

12 **A.** Yes.

13 **Q.** And Mr. Hossain is outlining some business metrics that he
14 would like to share with the press; is that right?

15 **A.** Let me read this. I haven't seen this, so....

16 (Witness examines document.) Yeah, that's what it appears
17 to discuss.

18 **Q.** Okay. I want to focus your attention on the very last
19 line of the page where Mr. Hossain writes that he "would like
20 to share strength and enterprise plus BV competitive, 30 new
21 enterprise clients, many of these were competitive with BV."

22 Did I read that correctly?

23 **A.** Yep.

24 **Q.** Do you have any reason to believe that's not true?

25 **A.** I have no reason to believe that's not true.

1 Q. Okay. I'd like to move up to Mr. Com  e's reply. At this
2 time Mr. Com  e would have been CEO of PowerReviews; correct?

3 A. That's correct.

4 Q. The second bullet point of Mr. Com  e's email reads:
5 (reading)

6 "Number one competitor (BV) recently IPO's - endorsing
7 social eCommerce."

8 Did I read that correctly?

9 A. Correct.

10 Q. And you also thought that Bazaarvoice was PowerReviews
11 number one competitor; correct?

12 A. I did.

13 MR. BONANNO: Your Honor, Government Exhibit 797 has
14 not yet been admitted into evidence, and I'd like to offer it
15 at this time.

16 THE COURT: Any objections?

17 MR. FELDMAN: No objection, Your Honor.

18 THE COURT: It's admitted.

19 (Plaintiff's Exhibit GX797 received in evidence)

20 BY MR. BONANNO:

21 Q. So despite the fact that this "blue ocean" strategy had
22 called for PowerReviews to move to the midmarket, didn't
23 PowerReviews continue to pursue existing Bazaarvoice customers
24 as well?

25 A. Yeah, we did. Can I -- one thing I think is important to

1 describe here.

2 We embarked on the strategy in August of 2011 and
3 discussed the products that we were going to develop. It takes
4 awhile to build these products. We launched the products I
5 think it was February, the date is in my head, February 27th of
6 2012.

7 So through August and up to February, we didn't have those
8 products in the market. We knew we were building them, and we
9 were all very motivated and excited about the products we were
10 building; but we had to build them. We had a -- you know, we
11 continued to compete as we had competed in the past because we
12 didn't have these products in the market yet.

13 And the quarter, that quarter results that we're talking
14 about here, are in arrears not -- you know, we didn't have
15 these products in market so we hadn't actually had the chance
16 to compete with Badgeville and Gigya and all those other guys,
17 because we didn't have the products in market.

18 **Q.** So Government Exhibit 797, just looking back at this, this
19 is an email that was written in May of 2012; right?

20 **A.** Correct.

21 **Q.** So that's several months after the February 2012 release
22 of the new PowerReviews products?

23 **A.** Yeah, but I think it's discussing -- you tell me if I'm
24 wrong here because I can probably take a look, but I think it's
25 discussing the quarter January, February, March and we would

1 have only had the products in market for one of those months in
2 that quarter.

3 **Q.** Mr. Luedtke, this email is written in May; correct?

4 **A.** Correct.

5 **Q.** And even after the introduction of these new products in
6 February, PowerReviews continued offering its
7 ratings-and-reviews product?

8 **A.** Yes, we did.

9 **MR. BONANNO:** Your Honor, may I approach the witness?

10 **THE COURT:** Yes.

11 (Pause in proceedings.)

12 **MR. BONANNO:** Seth, can we please put Government
13 Exhibit 1204 on the screen, please?

14 Mr. Luedtke, you can turn to the very last page of the
15 document to see the envelope information for the emails.

16 And I apologize, Seth. Can you take that off the screen
17 for a moment?

18 Your Honor, this exhibit was not on our exhibit list, and
19 I just want to give defense counsel a chance to review and make
20 sure there's no confidentiality concerns. I apologize for
21 publishing that before.

22 (Pause in proceedings.)

23 **MS. ALEPIN:** It will take me a minute.

24 **MR. BONANNO:** We can do the questioning without --

25 **MS. ALEPIN:** Can you proceed with him?

1 **MR. BONANNO:** I apologize.

2 **THE COURT:** Okay. That's all right.

3 **MR. BONANNO:** I'll keep it generic.

4 **Q.** Mr. Luedtke, this is a series of emails, an email
5 discussion, that you were involved in in March of 2012; is that
6 right?

7 **A.** That's correct, February and March.

8 **Q.** Okay. And I'd like to direct your attention to the first
9 email on the page from Ms. Peggy McGrath in March of 2012. Do
10 you see that, sir?

11 **A.** I do.

12 **Q.** Ms. McGrath was a salesperson at PowerReviews?

13 **A.** She was.

14 **Q.** Okay.

15 **MR. FELDMAN:** Excuse me, Your Honor. My expert tells
16 me that there is some confidential information here that were
17 Clorox here, they might object to. So you probably want to be
18 careful not to flash it.

19 **THE COURT:** Okay. That's fine.

20 **MR. BONANNO:** Okay. We'll keep it down. Thank you,
21 Mr. Feldman.

22 **MR. FELDMAN:** You're welcome.

23 **BY MR. BONANNO:**

24 **Q.** I'll direct your attention, Mr. Luedtke, to the second
25 paragraph, the last sentence. Ms. McGrath conveys her

1 impressions from meeting with an individual who believes that
2 his company was being raked over the coals on price by BV and
3 saw a potential opportunity to reduce his company's costs by
4 moving to PowerReviews. Is that a fair paraphrase of that
5 sentence?

6 **A.** Yes.

7 **Q.** And if you read the email just below this, Mr. Morris'
8 email, I'll just direct you to the last sentence of his first
9 paragraph. The client that Ms. McGrath was referring to is a
10 large Bazaarvoice retailer; correct?

11 **A.** Correct.

12 **Q.** So in March of 2012, PowerReviews was in active
13 discussions with a large Bazaarvoice retailer about potentially
14 switching from Bazaarvoice to PowerReviews; correct?

15 **A.** Let me read this.

16 (Witness examines document.) Yes.

17 **Q.** Okay.

18 **A.** Yes, that's correct.

19 **Q.** You can set that aside, Mr. Luedtke.

20 At the time that PowerReviews decided to embark on this
21 "blue ocean" strategy, it also had many large retail clients;
22 is that right?

23 **A.** PowerReviews did?

24 **Q.** Yes.

25 **A.** Yes, we did.

1 Q. And large retail clients like Staples; right?

2 A. Correct.

3 Q. And PowerReviews intended to continue servicing large
4 retail clients like Staples?

5 A. Correct.

6 Q. And provide them with ratings and reviews?

7 A. Correct.

8 Q. In fact, Mr. Luedtke, just before the merger, you
9 personally made a commitment to Staples that PowerReviews
10 wouldn't raise the Staples price for a year; isn't that right?

11 A. We had conversations about our contract, that's correct.

12 MR. BONANNO: Your Honor, may I approach the witness?
13 May I approach the witness?

14 THE COURT: Yes. Yes.

15 (Pause in proceedings.)

16 MR. BONANNO: Your Honor, this document also is not in
17 evidence, so I will give counsel a chance to review it for any
18 confidentiality concerns.

19 (Pause in proceedings.)

20 THE COURT: Are you going to introduce the prior
21 document?

22 MR. BONANNO: Yes, I am, Your Honor.

23 THE COURT: Then do you want to give it a number?

24 MR. BONANNO: Sure. I'll offer the previous document,
25 Government Exhibit 1204, into evidence.

1 **MR. FELDMAN:** Objection. Hearsay within hearsay. It
2 purports to relate what a customer, potential customer, said
3 when that customer was available to them and, in fact, was
4 deposed by them. And, so, this account of what the customer
5 said is hearsay within hearsay.

6 I don't object to the admission of the document. I object
7 to the consideration of hearsay within hearsay. There's no
8 exception. They're not a party.

9 **MR. BONANNO:** Your Honor, I think we're back to the
10 stipulation between the parties to admit into evidence unless
11 there's good cause shown regarding problems with authenticity
12 or some other item that would tend to indicate the document
13 itself is unreliable.

14 This was produced from Bazaarvoice's own files pursuant to
15 a document request in this litigation.

16 **MR. FELDMAN:** We didn't stipulate away the Federal
17 Rules of Evidence.

18 **THE COURT:** I'm going to admit the document, and I
19 will take your hearsay objections as I review the document
20 later on.

21 **MR. FELDMAN:** Thank you.

22 (Plaintiff's Exhibit GX1204 received in evidence)

23 **MR. BONANNO:** We'll just proceed without publishing
24 Government Exhibit 256 for now.

25 Seth, please don't put it on the screen.

1 Q. Mr. Luedtke, I'll direct your attention to the -- well,
2 let's go to the first page. This is an email conversation that
3 you had with an individual at Staples; correct?

4 A. Staples, yes.

5 Q. And the very last email on the bottom of the first page is
6 an email that you sent to an individual at Staples; correct?

7 A. That's correct.

8 Q. Okay. And if we turn the page, sir, I'd like to focus
9 your attention on the second full paragraph, the second
10 sentence. I'll keep it in generalities since we're not
11 publishing.

12 But you make a commitment to Staples not to change their
13 price for a year; correct?

14 A. The details are actually important. Can I read them out?
15 Like, I don't know, again, with confidentiality here if I can.
16 Because there's particulars of this and the specific words are
17 actually important.

18 MR. FELDMAN: As long as you don't mention pricing, we
19 think it's okay.

20 THE WITNESS: Yeah, okay. So can you ask your
21 question again?

22 BY MR. BONANNO:

23 Q. Sure. You committed to Staples not to raise their price
24 for a year; correct?

25 A. I committed to -- I suggested to Staples that we extend

1 those services, which is the -- it refers to the full scope of
2 services that Staples is using, we would not raise those for a
3 year.

4 **MR. BONANNO:** Okay. Your Honor, I offer Government
5 Exhibit 256 into evidence.

6 **MR. FELDMAN:** No objection, Your Honor.

7 **THE COURT:** It's admitted.

8 (Plaintiff's Exhibit GX256 received in evidence)

9 **BY MR. BONANNO:**

10 **Q.** So if the merger hadn't happened, Mr. Luedtke,
11 PowerReviews would have continued servicing Staples; correct?

12 **A.** We would have, yes.

13 **Q.** Now, Mr. Luedtke, despite the "blue ocean" strategy, you
14 intended to continue servicing Staples and your other large
15 retail clients; correct?

16 **A.** They're not contradictory. The "blue ocean" strategy
17 provided us an opportunity to actually expand the scope of the
18 service that we would provide to those same retailers.

19 **Q.** Now, Mr. Luedtke, isn't it true that after the merger,
20 Bazaarvoice went back on your commitment not to raise Staples'
21 price for a year?

22 **A.** I don't believe that's correct.

23 **MR. BONANNO:** Your Honor, may I approach the witness?

24 **THE COURT:** Yes.

25 **THE WITNESS:** And that's why the particulars of this

1 email are important.

2 (Pause in proceedings.)

3 **MR. BONANNO:** Seth, can you please put up Government
4 Exhibit 257?

5 **Q.** We're going to focus on the email at the bottom,
6 Mr. Luedtke. This is an email from a Staples representative to
7 you; correct?

8 **A.** That's correct.

9 **Q.** Okay. And this was an email that was written in July of
10 2012; correct?

11 **A.** Correct.

12 **Q.** At the time you received this email, you were aware that
13 the Department of Justice was investigating the acquisition of
14 PowerReviews by Bazaarvoice; correct?

15 **A.** I believe I was, yes.

16 **Q.** I'd like to focus your attention, sir, on the second
17 sentence -- actually, starting with the first sentence of
18 Mr. Tilzer's email: (reading)

19 "When you told me about the merger with BV, I thought
20 to myself this will head in one of two directions. Either
21 we're going to get an amazing capabilities over time once
22 the products got integrated, et cetera, or you guys would
23 try to exploit the combining the number one and number two
24 players with unreasonable pricing along the lines of the
25 antitrust considerations you read in the press. I am

1 hopefully [sic] the former path is what we'll get to, but
2 I'm sensing we are going down the later path from what
3 I've heard from the progression of the negotiation -
4 inclusive of 2X increase in the core cost of the core PR
5 service to Staples.com with zero added value provided to
6 us."

7 Did I read that correctly, sir?

8 **A.** Yes.

9 **Q.** You can set that aside, Mr. Luedtke.

10 You recall, Mr. Luedtke, during your counsel's examination
11 yesterday, he asked you a question about a PowerReviews slide
12 that had the Target logo on it? Do you remember the slide with
13 the Target logo?

14 **A.** Yep.

15 **Q.** And he asked you who provided ratings and reviews to
16 Target; correct?

17 **A.** Yes. Correct.

18 **Q.** And you said Pluck provided ratings and reviews to Target;
19 right?

20 **A.** Correct.

21 **Q.** Now, isn't it true, Mr. Luedtke, that just during its most
22 recent earnings call with analysts, Bazaarvoice announced that
23 Target would, in fact, be switching from Pluck to Bazaarvoice?

24 **A.** Yes.

25 **Q.** During counsel's questioning yesterday, you also discussed

1 that PowerReviews had a few financial hiccups during late in
2 your tenure as CEO; correct?

3 **A.** Correct.

4 **Q.** And you testified, I believe, that in the year before the
5 transaction, PowerReviews had somewhere between 11 and
6 \$12 million in revenue; is that right?

7 **A.** Correct. Correct.

8 **Q.** Mr. Luedtke, at the time the transaction closed when
9 Bazaarvoice bought PowerReviews, the purchase price was in
10 excess of \$160 million; correct?

11 **A.** Correct.

12 **MR. BONANNO:** I have no further questions, Your Honor.

13 **THE COURT:** Mr. Feldman, please proceed.

14 **RECROSS-EXAMINATION**

15 **BY MR. FELDMAN:**

16 **Q.** You're probably too young to remember Paul Harvey, but he
17 used to have a show called "The Rest of the Story." So could
18 you give us the rest of the story on the Staples? Mr. Bonanno
19 gave you an angry email --

20 **A.** Sure.

21 **Q.** -- accusing you of playing the board game Monopoly. What
22 happened to Staples after that?

23 **A.** So Brian Tilzer, who's our main client, emailed me about
24 something that he heard from his team about increasing the
25 price. I subsequently explain in an email all the incremental

1 value, all the additional services that we were providing to
2 him, and they were significant; and also I explained how they
3 were pricing at a discount to what we would normally go to the
4 market with.

5 And I don't remember specifically if he actually sent me
6 an email back, but we signed that contract and he said,
7 "Great," and we moved on.

8 **Q.** I'm going to hand you a document, Defendant's 1851.

9 **A.** Ah, here it is. Thanks for the note. It's a very helpful
10 synopsis. That's what it says.

11 **Q.** Wait. Let me hand it up to His Honor.

12 Do you recognize Exhibit 1851?

13 **A.** Yes, I do.

14 **Q.** What is it?

15 **A.** It's the -- it's what I just discussed, my explanation of
16 what he was getting additional in terms of value, sort of in
17 response to the email that he had sent to me.

18 **MR. FELDMAN:** We've redacted the pricing data here,
19 Your Honor. I move its admission into evidence.

20 **MR. BONANNO:** No objection, Your Honor.

21 **THE COURT:** It's admitted.

22 (Defendant's Exhibit DX1851 received in evidence)

23 **BY MR. FELDMAN:**

24 **Q.** I just want to ask you about one sentence on page 2. This
25 is postmerger; right?

1 **A.** Postmerger, yes.

2 **Q.** Yeah. On page 2, quote: (reading)

3 "The bundled pricing for these services represents a
4 significant discount to our off-the-shelf pricing,
5 particularly considering the size of the Advantage
6 business and the number of additional languages we will be
7 supporting," closed quote.

8 You wrote that?

9 **A.** I did.

10 **Q.** What does it mean?

11 **A.** It means we were giving them a discount. We were adding
12 all these services on page 1 -- 1, 2, 3, 4, 5, 6 -- which
13 actually were a lot of the services that we provided with our
14 new Essential Social Suite; and we were -- and that sort of in
15 total, because he was taking a lot of them, represented sort of
16 a volume discount for what he was buying.

17 **MR. FELDMAN:** Thank you. No further questions.

18 **FURTHER REDIRECT EXAMINATION**

19 **BY MR. BONANNO:**

20 **Q.** I just have one follow-up question for you, Mr. Luedtke.
21 Sitting here today, can you say with certainty that the
22 PowerReviews price wouldn't have been lower if Bazaarvoice and
23 PowerReviews were competing instead of having merged at the
24 time of those negotiations?

25 **A.** Let's see... No, I can't. I can't say that with

1 certainty.

2 **MR. BONANNO:** Nothing further, Your Honor.

3 **THE COURT:** Mr. Luedtke, I have a couple of questions
4 unless, Mr. Feldman?

5 **MR. FELDMAN:** No, thank you, Your Honor.

6 **THE COURT:** Yesterday there was an Exhibit 255, which
7 you don't have to look for unless you can't remember it, but it
8 says -- it started with, "It will validate the space," in
9 talking about the Bazaarvoice IPO and another thing. It talked
10 about some other things that counsel was interested in. What
11 did that mean?

12 **THE WITNESS:** It sort of would -- what I meant by
13 that, it would bring, like, financial market recognition, a
14 validation that a company could successfully go public on the
15 market.

16 **THE COURT:** And what was the space?

17 **THE WITNESS:** I was talking about sort of social
18 broadly. Remember we talked yesterday about this, like, very
19 ambiguous thing called social SEOs were dealing with? It would
20 basically be a way for the financial market to validate that
21 there's a company playing in this area that has done well
22 enough and is successful enough and is credible enough to go
23 public on the public markets.

24 **THE COURT:** And at the time of that document, which I
25 think was February of 2011 --

1 **THE WITNESS:** Yeah, roughly.

2 **THE COURT:** -- was the space you were referring to the
3 ratings and reviews because that was the business you were in
4 or was it something else?

5 **THE WITNESS:** No. It was social. That's what we were
6 talking about, the social, social commerce space.

7 **THE COURT:** Then in Exhibit 513, which we've been
8 looking at, first of all, what's Badgeville? What did they do?

9 **THE WITNESS:** Yeah. Badgeville is a company that
10 does -- they call it gamification. So essentially what they do
11 is they provide a software that provides game dynamics to
12 driving commerce.

13 So let me give you an example. You come on a site and you
14 write, this is from my perspective, you write a review. You
15 might get five points for writing a review, and you move up
16 like a little leader board; and then you buy a product, and you
17 might move further up a leader board.

18 It's -- you know, how Zynga has sort of done a really good
19 job of, like, providing these game dynamics, they basically
20 took Zynga's game dynamics and applied it to software.

21 **THE COURT:** So you list them and Bazaarvoice and
22 Lithium and Gigya as the strongest near to our competition. At
23 the time that you developed this competitive summary, did you
24 consider Amazon to be a competitor?

25 **THE WITNESS:** Amazon was a competitor in that it was

1 the biggest competitor of our customer base. So we looked at
2 them for, like, product innovation. Because they didn't
3 provide -- they weren't a software company in the context of,
4 like, going out and selling software to retailers, we didn't --
5 we didn't run up to them -- run into them in deals.

6 **THE COURT:** And as of the spring of 2012, what
7 percentage of your -- of PowerReviews' revenues came from
8 retailers?

9 **THE WITNESS:** Upwards probably 90 percent. Of our --
10 so remember we still had a little Buzzillions business there.
11 So if you take that out and just look at our total services
12 business, it was vast, 80-90 percent.

13 **THE COURT:** And still you were developing this new
14 suite of products, but it was still ratings-and-reviews
15 generated?

16 **THE WITNESS:** Yes. Yes. Exactly right.

17 **THE COURT:** Yesterday I thought I heard you say at the
18 end of your testimony that syndication wasn't important for the
19 retailers, and I think earlier in your testimony you said that
20 it's very important for the brands.

21 **THE WITNESS:** Yeah.

22 **THE COURT:** Are both of those -- am I right about both
23 of those things?

24 **THE WITNESS:** I think maybe it's a little -- I mean,
25 maybe it's in the extreme fashion, but it was more important

1 for the brands than it was for the retailers.

2 **THE COURT:** And why was -- was it unimportant to the
3 retailers?

4 **THE WITNESS:** No. It was -- it was a net -- retailers
5 want more content. So to the extent they can get it from the
6 brands, fantastic. More content, more SEOs, as we talked about
7 yesterday, more conversion, that's great.

8 Brands, though, it was more important for brands because
9 brands didn't have a lot of visits coming to their sites, so
10 they -- and they didn't often -- not -- at least at the time,
11 it's changing now, they didn't sell their products on their
12 site so they couldn't -- they couldn't take advantage of some
13 of the conversion benefits of ratings and reviews. That's why
14 it was -- that's why they wanted their content to go out to the
15 retailers to whom they sold all their products.

16 **THE COURT:** As of this time, I don't know whether you
17 know the answer to this question, but did Amazon have a
18 ratings-and-review product that they were using internally?

19 **THE WITNESS:** For Amazon?

20 **THE COURT:** For Amazon, yes.

21 **THE WITNESS:** On Amazon, absolutely. Yeah. Yeah.
22 And the inspiration, I think, for both these companies was that
23 Amazon had this great review product and we could actually
24 democratize it for the rest of retail.

25 **THE COURT:** PowerReviews dealt with retailers. Was

1 there a barrier to working in advertising or financial
2 services? Not a barrier to entry, but just what were the
3 reasons why you weren't going after those?

4 **THE WITNESS:** Financial services -- the problem with
5 financial services, there's two real big ones. One is, they
6 didn't actually sell a lot on their site, so it was part of the
7 value that we were able to give to retailers, because our --
8 the reason why our product works so well with retailers,
9 retailers had an email address of the person that they -- who
10 bought on the site, and a great vehicle for us to generate all
11 this content was actually to email that person. That's how we
12 generated the vast majority of our content.

13 It was different for financial services because I guess if
14 you sign up for a credit card, you get your email; but the
15 volume wasn't as big as it was for retailers. Does that make
16 sense? So, like, the frequency of transactions. That was one
17 problem.

18 The second problem was there were a lot of sort of rules
19 and regulations for putting software on financial services
20 sites. I forget what -- I forget what it was called. HIPPA is
21 the equivalent in the healthcare industry. You had to be HIPPA
22 compliant. And there were the same things -- I think it was
23 SaaS -- I don't know. I forget exactly what it was, but there
24 was some cost that we had to incur to sort of be, what was it,
25 sort of validated or approved, I guess, to provide our software

1 on some financial services sites. And as a small startup, we,
2 for our reasons, chose not to invest there.

3 **THE COURT:** And how about advertising?

4 **THE WITNESS:** Tell me -- actually, putting our --
5 putting our services on advertising sites?

6 **THE COURT:** Yes. Well, it's been described earlier
7 that there were -- in the ways that you look at the customer
8 bases, there's retailers and then there's advertisers and then
9 there's financial services. If you didn't think about it that
10 way, then you don't need to answer, of course.

11 **THE WITNESS:** No, we didn't think about advertisers as
12 a vertical. I think we thought about retailers. We thought
13 about manufacturers. We thought about automotive. We thought
14 about financial services. We thought about healthcare.

15 Advertisers, as sort of at least as we thought about it,
16 were people who put advertising across all those sites. So
17 they were providers of services for all of those -- all those
18 verticals.

19 **THE COURT:** Okay. And as you said, you focused solely
20 on the retailers primarily?

21 **THE WITNESS:** That's where our primary -- that's where
22 our core base was.

23 **THE COURT:** Thanks very much.

24 **THE WITNESS:** Thank you. All set? Okay, thanks.

25 **THE COURT:** Thanks very much, Mr. Luedtke.

1 **THE WITNESS:** Thank you.

2 (Witness excused.)

3 **MS. SCANLON:** Good morning, Your Honor. I'm Lisa
4 Scanlon for the United States.

5 **THE COURT:** Ms. Scanlon.

6 **MS. SCANLON:** At this time we call Jacqueline
7 Cunningham.

8 **JACQUELINE CUNNINGHAM,**
9 called as a witness for the Plaintiff, having been duly sworn,
10 testified as follows:

11 **THE WITNESS:** I do.

12 **THE CLERK:** Be seated.

13 Please state your full name and spell your last name.

14 **THE WITNESS:** Jacqueline Cunningham,
15 C-U-N-N-I-N-G-H-A-M.

16 **DIRECT EXAMINATION**

17 **BY MS. SCANLON:**

18 **Q.** Good morning, Ms. Cunningham.

19 **A.** Good morning.

20 **Q.** We met a few minutes ago earlier this morning, but I'm
21 Lisa Scanlon for the United States.

22 Where do you work, Ms. Cunningham?

23 **A.** BJ's Wholesale Club in Massachusetts.

24 **Q.** Okay. What is BJ's business?

25 **A.** BJ's is a retail company. It's a wholesale club. We buy

1 products, food and general merchandise, to resell to the
2 public.

3 Q. Does BJ's have retail stores where it sells these
4 products?

5 A. Yes.

6 Q. And just about how many stores does BJ's have?

7 A. 200.

8 Q. Where are those stores located?

9 A. East Coast.

10 Q. East Coast of the United States?

11 A. East Coast of the United States, yes.

12 Q. Does BJ's also have a Web site where it sells products?

13 A. Yes.

14 Q. What is that Web site called?

15 A. Bjs.com.

16 Q. And, Ms. Cunningham, what is your position at BJ's?

17 A. I'm the vice president of eCommerce.

18 Q. How long have you had that position?

19 A. A little less than five years now.

20 Q. Could you tell us what your responsibilities are as the
21 vice president of eCommerce at BJ's?

22 A. I'm responsible for the management of the Web site, the
23 marketing of the Web site, site operations, which includes
24 ensuring that products are available for sale on the Web site,
25 that the inventory is available, pricing is set, et cetera.

1 Q. Okay. And you mentioned Web site management. Would you
2 explain a little bit more what that is?

3 A. So it is our responsibility to ensure that the Web site is
4 up and running 24 hours a day, seven days a week; that we --
5 all of the, I call it IT, all of the IT processes are working
6 properly.

7 We're also responsible for ensuring that the right
8 products are up on the Web site, that we're promoting the right
9 products in a seasonally appropriate manner, that we're
10 marketing those out into other sites as we deem it's
11 appropriate to continue to sell those products.

12 Q. Ms. Cunningham, do you know what product ratings and
13 reviews are?

14 A. Yes.

15 Q. Would you state your understanding of product ratings and
16 reviews?

17 A. So product ratings and reviews are pieces of content that
18 come to us from our customers after they have purchased a
19 product telling us about their experience with the product,
20 whether they liked it or didn't like it, how it worked, did it
21 meet their expectations.

22 Q. And based on your answer, I take it there are ratings and
23 reviews on Bjs.com?

24 A. That is correct.

25 Q. And how long has BJ's had ratings and reviews on its Web

1 site?

2 **A.** We launched them when we relaunched the Web site in I
3 believe it was October of 2010.

4 **Q.** Now, in your role as vice president of eCommerce, do you
5 have any responsibilities relating to ratings and reviews?

6 **A.** Yes.

7 **Q.** What are those responsibilities?

8 **A.** It is our responsibility to publish the reviews that our
9 members, our customers, we call them members, it's our
10 responsibility to publish them to the Web site in a timely
11 manner, and also to audit them to ensure that the content is
12 not objectionable to our members.

13 **Q.** Now, back in 2010 were you involved in the decision to add
14 ratings and reviews to Bjs.com?

15 **A.** Yes.

16 **Q.** And what was your role in that decision?

17 **A.** It was our responsibility to identify potential partners
18 that could bring that functionality to our Web site and to
19 determine what the best course of action was to enable that
20 functionality on our Web site.

21 **Q.** And you said "our." Did you mean the eCommerce group
22 within BJ's?

23 **A.** Yes. As well as the IT team, yeah.

24 **Q.** What was your specific responsibility in regards to the
25 decision to add ratings and reviews?

1 **A.** It was our -- it was my responsibility, my and my team's
2 responsibility, to determine what partners out there in the
3 marketplace we could work with to bring that functionality to
4 the Web site, to review internally whether we could build it
5 and host it ourselves, and then make the best decision for the
6 business.

7 **Q.** Okay. To your knowledge, why did BJ's incorporate ratings
8 and reviews on Bjs.com?

9 **A.** It is -- it has been well -- it is well known and it has
10 been documented in the industry that reviews help sell product,
11 that customers are more comfortable making decisions about
12 product when they see content from other customers.

13 **Q.** Okay. And just a moment ago you mentioned looking at
14 whether BJ's should build ratings and reviews in-house. Was
15 that a consideration that BJ's made back in 2010?

16 **A.** Yep. Yes.

17 **Q.** And you were involved in that decision?

18 **A.** Yes.

19 **Q.** Okay. What did BJ's ultimately decide about building an
20 internal ratings-and-reviews product?

21 **A.** We were not going to do it.

22 **Q.** And do you know why?

23 **A.** We didn't have the time or the talent or the resources.

24 **MS. SCANLON:** May we approach, Your Honor?

25 **THE COURT:** Yes.

1 **BY MS. SCANLON:**

2 **Q.** So, Ms. Cunningham, you're going to receive a binder that
3 has some documents in it, and I'm going to ask you to turn to
4 the tab for Government Exhibit 445.

5 **A.** (Witness examines document.)

6 **MS. SCANLON:** Your Honor, Government Exhibit 445 has
7 been admitted pursuant to the stipulation between the parties.

8 **THE COURT:** Thank you.

9 **BY MS. SCANLON:**

10 **Q.** Do you have that document, Ms. Cunningham?

11 **A.** Yes.

12 **Q.** Okay. If you would turn to the second page near the top,
13 there's an email from Mario Protano. Do you see that?

14 **A.** Yes.

15 **Q.** Do you know who Mr. Protano is?

16 **A.** Yes.

17 **Q.** And who is he?

18 **A.** He's the assistant vice president of eCommerce for BJ's.

19 **Q.** So he reports to you?

20 **A.** Yes, he does.

21 **Q.** And was he involved in BJ's evaluation of
22 ratings-and-reviews providers?

23 **A.** Yes, he was.

24 **Q.** What was his role in that process?

25 **A.** He worked with me to -- in fact, he did a lot of the

1 footwork to determine what third-party partners we could
2 potentially look at. He also worked with the IT team when we
3 had conversations about considering whether to build it
4 in-house or not.

5 Q. And I think you said he was involved in a lot of the
6 footwork. Does that mean he did a lot of the actual back and
7 forth with companies and evaluation?

8 A. Yes.

9 Q. Did he keep you involved in that process as it went along?

10 A. Yes, he did.

11 Q. And Mr. Protano's email is to Mark Kole. Do you know who
12 Mr. Kole is?

13 A. He works for Bazaarvoice.

14 Q. And I also believe it's copied to Ms. Rosen at Snowflake
15 Rosen. Do you know who she is?

16 A. Yes. She was a sales -- I'm not quite sure of her title,
17 but she was a sales representative that we met with.

18 Q. And what -- for Bazaarvoice?

19 A. For Bazaarvoice, yes.

20 Q. Thank you.

21 Looking at the text of Mr. Protano's email, he wrote:

22 (reading)

23 "Mark/Snowflake:

24 "BJ's is now ready to begin discussions implementing
25 consumer reviews into our new websphere platform scheduled

1 to go live in July. We would like you to present to us
2 why Bazaarvoice is a better option over PowerReviews."

3 Do you see where I am?

4 **A.** Yes, I do.

5 **Q.** Okay. In 2009 was BJ's considering Bazaarvoice as a
6 ratings-and-review vendor?

7 **A.** Yes.

8 **Q.** Was BJ's also considering PowerReviews?

9 **A.** Yes.

10 **Q.** Do you know how BJ's identified PowerReviews and
11 Bazaarvoice as potential ratings-and-reviews providers?

12 **A.** They were known in the industry. I had had experience
13 with PowerReviews in a prior position. Bazaarvoice --
14 Bazaarvoice is well known in the industry, so they were known
15 to us.

16 We also did research in *Internet Retailer Top 500*. It's
17 an annual book that comes out that tells us who the top 500
18 eCommerce sites are and some of the service providers that they
19 may use --

20 **Q.** Thank you.

21 **A.** -- on those sites.

22 **Q.** I'd like you to now turn to Government Exhibit 444.

23 **A.** (Witness examines document.)

24 **Q.** Government Exhibit 444 appears to be a couple of emails.

25 The bottom email appears to be an email from Snowflake Rosen to

1 Mr. Protano; is that right?

2 A. Yes.

3 Q. And the subject is Ms. Rosen's email from November 10,
4 2009, "Bazaarvoice Agenda Request for Friday's Meeting."

5 Do you know whether Bazaarvoice held a presentation for
6 BJ's?

7 A. Yes, it did.

8 Q. And do you know whether in the presentation they provided
9 information about their ratings-and-review product?

10 A. Yes, they did.

11 Q. Did you attend any Bazaarvoice presentation to BJ's?

12 A. Yes, I did.

13 Q. If you look at Mr. Protano's email back to Ms. Rosen,
14 which is just above that. Are you there?

15 A. Yes.

16 Q. Okay.

17 Mr. Protano wrote: (reading)

18 "As best as possible, please focus on the
19 ratings-and-reviews functionality."

20 So was the ratings-and-reviews functionality the focus for
21 BJ's in its evaluation?

22 A. Yes.

23 MS. SCANLON: Your Honor, Government Exhibit 444 is
24 not in evidence. I would like to offer it at this time.

25 THE COURT: Any objection?

1 **MR. LIDDIARD:** No objection.

2 **THE COURT:** It's admitted.

3 (Plaintiff's Exhibit GX444 received in evidence)

4 **MS. SCANLON:** Thank you.

5 **Q.** Did PowerReviews also make a representation to BJ's about
6 its products features and capabilities?

7 **A.** Yes, they did.

8 **Q.** Did you attend a PowerReviews presentation at BJ's?

9 **A.** Yes, I did.

10 **Q.** Did BJ's evaluate any other ratings-and-review providers
11 during this time period?

12 **A.** There was another provider whose name escapes me, and I --
13 I simply can't remember it. They were early on in our
14 considerations, though.

15 **Q.** Do you know whether that firm made a presentation to BJ's
16 about its product features and capabilities?

17 **A.** I don't believe they made a live presentation. We vetted
18 them out of the process pretty early on.

19 **Q.** And do you know why BJ's vetted that firm out of the
20 process?

21 **A.** To the best of my recollection, it was because they didn't
22 have the integration and functionality that we needed at the
23 time.

24 **Q.** During the evaluation process for a ratings-and-review
25 provider, did BJ's receive pricing proposals from Bazaarvoice

1 and PowerReviews?

2 A. Yes, we did.

3 Q. I want to ask you to turn to what's been marked as
4 Government Exhibit 1196.

5 A. (Witness examines document.)

6 Q. Do you see 1196?

7 A. Yes.

8 Q. Okay. And what is this document?

9 A. Competitive conversation.

10 Q. It appears to be an email from Ms. Rosen to you and
11 Mr. Protano; is that correct?

12 A. Yes.

13 Q. And it was sent December 14, 2009?

14 A. Yes.

15 Q. Now, Ms. Rosen wrote in her email: (reading)

16 "Jackie and Mario:

17 "I had a good call with Jason this afternoon. We got
18 into the details on a range of competitive differentiators
19 between us and PowerReviews that I'd really love to
20 discuss directly with the two of you."

21 In the second sentence I just read, what did you
22 understand "competitive differentiators between us and
23 PowerReviews" to mean?

24 A. Bazaarvoice, if I'm reading this correctly, Bazaarvoice
25 offered a broader suite of capabilities than PowerReviews did

1 at the time.

2 Q. And Ms. Rosen wrote in the second paragraph of her email
3 to you and Mr. Protano: (reading)

4 "I understand we're in a place where the proposals
5 show a Delta in cost."

6 What did you understand that statement to mean?

7 A. That they were more expensive at the time. Their proposal
8 was more expensive than their competition.

9 Q. And you mean Bazaarvoice was more expensive?

10 A. Yes.

11 Q. And she continues in that paragraph to say: (reading)

12 "This is not surprising to me as it is SOP in this
13 situation."

14 What did you understand that statement to mean?

15 A. I understand the statement to mean that they were more
16 expensive because they did have a broader suite of capabilities
17 to offer us than what we were getting from the competition.

18 Q. From what PowerReviews was offering?

19 A. Yes.

20 MS. SCANLON: Okay. Your Honor, Government
21 Exhibit 1196 is not in evidence. I would like to offer it at
22 this time.

23 MR. LIDDIARD: No objection.

24 THE COURT: It's admitted.

25 (Plaintiff's Exhibit GX1196 received in evidence)

1 **BY MS. SCANLON:**

2 **Q.** So, Ms. Cunningham, we now turn to what's been marked as
3 Government Exhibit 440.

4 **A.** (Witness examines document.) Got it.

5 **Q.** This appears to be another email from Ms. Rosen to
6 Mr. Protano and others; is that correct?

7 **A.** Yes.

8 **Q.** And in December 19th, 2009?

9 **A.** Yes.

10 **Q.** Okay. And the title of this is -- the subject line is
11 "Bazaarvoice Revised Proposal"; is that right?

12 **A.** Correct.

13 **Q.** Do you know whether BJ's received more than one pricing
14 proposal from Bazaarvoice?

15 **A.** Yes, we did.

16 **Q.** And do you know if the prices changed from proposal to
17 proposal?

18 **A.** Yes, they did.

19 **Q.** Do you know how they changed?

20 **A.** They went down.

21 **Q.** Do you have a sense of how much they went down?

22 **A.** From proposal to proposal, no, not off the top of my head.

23 **MS. SCANLON:** Your Honor, Government Exhibit 440 is
24 not in evidence. I'd like to offer it at this time.

25 **MR. LIDDIARD:** No objection.

1 **THE COURT:** Admitted.

2 (Plaintiff's Exhibit GX440 received in evidence)

3 **BY MS. SCANLON:**

4 **Q.** One more document for you, Ms. Cunningham. Would you turn
5 to Government Exhibit 432?

6 **A.** (Witness examines document.)

7 **Q.** Okay. So, Ms. Cunningham, 432 appears to be an email from
8 Pehr Luedtke to Mr. Protano and Jason Leboeuf; is that right?

9 **A.** Yes.

10 **Q.** Do you know who Mr. Luedtke is?

11 **A.** He works for PowerReviews. I don't know his title
12 specifically.

13 **Q.** Okay. But he was a PowerReviews employee at the time?

14 **A.** He was the CEO at the time, yes.

15 **Q.** And I'd like you to look at the heading where it says
16 "Commercial Proposition," please.

17 **A.** Yes.

18 **Q.** Mr. Luedtke wrote: (reading)

19 "I want to reiterate my offer from yesterday's call
20 because I realize that price was an important factor to
21 your decision."

22 Was price an important factor to BJ's in choosing a
23 ratings-and-review provider?

24 **A.** Yes.

25 **Q.** And he continues: (reading)

1 "I'm authorizing John to package this as a three-year
2 contract with the first year completely free."

3 Now, do you know whether BJ's received more than one
4 pricing proposal from PowerReviews?

5 A. Yes.

6 Q. And do you know whether the prices changed from proposal
7 to proposal?

8 A. Yes.

9 Q. And do you know in what direction they changed?

10 A. They got better.

11 Q. Pardon?

12 A. They went down. They got better.

13 Q. Thank you.

14 At the end of its evaluation process, did BJ's determine
15 whether Bazaarvoice met BJ's technical requirements as a
16 ratings-and-review provider?

17 A. Yes.

18 Q. And did BJ's determine whether PowerReviews met its
19 technical requirements as a ratings-and-review provider?

20 A. Yes.

21 Q. And did BJ's select one of those companies to provide
22 ratings and reviews?

23 A. Yes.

24 Q. Which company?

25 A. PowerReviews.

1 Q. Now, moving on from the vendor-selection process, I just
2 want to ask you a few questions about social media.

3 A. Sure.

4 Q. You can close your binder.

5 Does BJ's have a Facebook page?

6 A. Yes.

7 Q. All right. In your position as vice president of
8 eCommerce at BJ's, have you ever considered dropping ratings
9 and reviews and relying solely on Facebook?

10 A. No.

11 Q. Why not?

12 A. They provide two different services to our members.
13 Reviews provide information about -- specifically about
14 products and products that have been purchased by our members.
15 Social media is a forum for our members to communicate back and
16 forth with each other and with the company.

17 Q. Now, does BJ's have a Twitter account?

18 A. Yes.

19 Q. Okay. And same question. As your position as
20 vice president of eCommerce at BJ's, have you ever considered
21 dropping ratings and reviews and relying solely on Twitter?

22 A. No.

23 Q. And why not?

24 A. Same reasons.

25 Q. And does BJ's have a Pinterest page?

1 **A.** Yes. Very new, yes.

2 **Q.** And as a vice president of eCommerce at BJ's, have you
3 ever considered dropping ratings and reviews and relying on
4 Pinterest instead?

5 **A.** No.

6 **Q.** Same reason?

7 **A.** Same reason.

8 **MS. SCANLON:** Nothing further, Your Honor.

9 **THE COURT:** Okay.

10 Mr. Liddiard?

11 **MR. LIDDIARD:** Thank you. If I may have a moment,
12 Your Honor.

13 **THE COURT:** Absolutely.

14 Actually, why don't we take our ten-minute morning break.

15 (Recess taken at 9:23 a.m.)

16 **THE COURT:** Mr. Liddiard, go ahead.

17 **MR. LIDDIARD:** Thank you.

18 **CROSS EXAMINATION**

19 **BY MR. LIDDIARD**

20 **Q.** Good morning, Ms. Cunningham.

21 **A.** Good morning.

22 **Q.** The last time we met, I believe, was a few months ago in
23 June, in your neck of the woods, correct?

24 **A.** Correct.

25 **Q.** How are you doing this morning?

1 **A.** Good.

2 **Q.** And thank you for making the trip.

3 Is BJ's a privately held company today?

4 **A.** Yes.

5 **Q.** And BJ's went from a public company to a private company
6 sometime in 2011. Is that correct?

7 **A.** Correct.

8 **Q.** And does BJ's disclose its financial information to the
9 public?

10 **A.** No.

11 **Q.** And it doesn't disclose what its Web revenues are. Is
12 that correct?

13 **A.** Correct.

14 **Q.** And have you heard of a company that publishes the
15 *Internet Retailer 500*?

16 **A.** Yes.

17 **Q.** And has BJ's, to your knowledge, provided the *Internet*
18 *Retailer 500* its online Web sales data?

19 **A.** No.

20 **Q.** Do you have any idea where the *Internet Retailer 500* would
21 get that information?

22 **A.** It is my understanding that they make estimates for
23 companies such as ourselves that do not provide that data to
24 them.

25 **Q.** And, Ms. Cunningham, you have worked for BJ's for

1 approximately five years?

2 A. Correct.

3 Q. And you're the vice president of eCommerce, correct?

4 A. Correct.

5 Q. And in your role as the vice president of eCommerce for
6 BJ's, I take it from time to time you engage with different
7 vendors of eCommerce products and services, correct?

8 A. Correct.

9 Q. And they're trying to sell you different items, correct?

10 A. Correct.

11 Q. And would that include software vendors such as vendors
12 that provide rating and review products?

13 A. Yes.

14 Q. And would it be fair to say that if BJ's became unhappy
15 with the services or products that are provided, for example,
16 by a software vendor, that you would sever that relationship?

17 A. Yes.

18 Q. And, for example, if there is an agreement that BJ's had
19 in place with that particular software vendor you, as the vice
20 president of eCommerce, would not renew the agreement?

21 A. Correct.

22 Q. And if I understood correctly from your earlier testimony,
23 shortly after you joined BJ's in 2009 you initiated a process
24 of selecting a vendor for ratings and reviews. Is that
25 correct?

1 **A.** Correct.

2 **Q.** And in that process I think -- I believe you testified
3 that you identified, initially, three vendors. One dropped out
4 of the process fairly early, and the two remaining were
5 PowerReviews and Bazaarvoice. Is that correct?

6 **A.** Correct.

7 **Q.** And in addition to considering those three vendors in the
8 initial process back in 2009 and 2010, BJ's was also
9 considering, at that time, whether to build an internal rating
10 and review solution. Is that correct?

11 **A.** Correct.

12 **Q.** And by March of 2010, BJ's had selected PowerReviews as
13 its vendor for ratings and reviews. Is that correct?

14 **A.** Correct.

15 **Q.** Thereabouts?

16 **A.** Correct. Sorry, yes.

17 **Q.** And BJ's, at that time, decided that it didn't want
18 syndication, correct?

19 **A.** Correct.

20 **Q.** And BJ's also decided at that time that it was going to do
21 the moderation or, I think, maybe your words were the auditing
22 of reviews internally. Is that correct?

23 **A.** We do do second-level moderation, yes. Our partner does a
24 first-level moderation before they come to us.

25 **Q.** What's the difference between a first level and a second

1 level?

2 **A.** So our partners will take a look at the reviews that come
3 in for our product, to ensure that there's no objectionable
4 language, et cetera. And then they send them to us. We'll
5 look at them just to make sure that the reviews that we -- that
6 have been submitted are actually for the products that they
7 represent.

8 **Q.** And I believe in your deposition your testimony was that
9 moderation was fairly simple, right?

10 **A.** Correct.

11 **Q.** And in the April 2010 time period, BJ's entered into a
12 three-year agreement with PowerReviews. Is that correct?

13 **A.** Correct.

14 **Q.** And I take it that if BJ's had become dissatisfied with
15 its rating and reviews provider it would consider other
16 vendors. Fair to say?

17 **A.** Correct.

18 **Q.** And, in fact, if BJ's became unsatisfied with the services
19 that it was receiving under the PowerReviews agreement, it
20 would not extend that agreement, correct?

21 **A.** Correct.

22 **Q.** And so when the PowerReviews agreement came up for
23 expiration earlier this year, BJ's renewed that agreement,
24 correct?

25 **A.** Correct.

1 Q. And as we sit here today or as you sit here today BJ's is
2 still receiving ratings and reviews functionality with respect
3 to the PowerReviews product. Is that correct?

4 A. Correct.

5 Q. And has prices changed in any way?

6 A. Not -- no.

7 Q. And are you satisfied with the services that BJ's is
8 receiving with respect to ratings and reviews today?

9 A. They're acceptable, yes.

10 Q. And when the agreement was renewed this year -- you're
11 aware that Bazaarvoice acquired PowerReviews back in the summer
12 of 2012. Is that correct?

13 A. Correct.

14 Q. And would it be fair to say that, in your opinion as the
15 vice president of eCommerce for BJ's, you're not concerned
16 about that acquisition, are you?

17 A. We discussed it and decided to renew.

18 Q. In your view, has BJ's been harmed by the acquisition of
19 PowerReviews by Bazaarvoice?

20 A. No.

21 Q. Going back to a discussion about in-house and BJ's
22 consideration back in 2009, 2010, and its consideration of
23 going -- building an in-house solution, did BJ's, at that point
24 in time, try to estimate how much it would cost BJ's to build
25 that functionality in-house?

1 **A.** Excuse me. It is my understanding that our IT team did
2 attempt to make that estimate. I don't recall the number.

3 **Q.** And since that time back in 2009 or early 2010, has BJ's
4 considered or looked at whether it could build its own in-house
5 solution?

6 **A.** No.

7 **Q.** And, Ms. Cunningham, when the agreement comes up for
8 renewal or is set to expire sometime in April of 2014, at that
9 particular time if you decide not to renew the agreement would
10 you consider and go in and look at who the other providers of
11 rating and review functionality are in the marketplace?

12 **A.** Yes.

13 **Q.** And is it fair to say that you haven't done that since
14 signing the agreement with PowerReviews back in 2010?

15 **A.** It is fair to say we have not. But we will go through a
16 formal bid process this year for that functionality, so we will
17 be doing that, yes.

18 **Q.** And BJ's has never syndicated content. Is that correct?

19 **A.** Correct.

20 **Q.** And when the term "syndication" is used with respect to
21 ratings and reviews, what do you understand it to mean?

22 **A.** It means that we have the ability to take content, in this
23 case reviews from other sources, and syndicate them and use
24 them on our website.

25 **Q.** And I take it since BJ's has never syndicated reviews it's

1 not an important feature to a company such as BJ's. Is that
2 correct?

3 **A.** We determined, when we launched our reviews, that it was
4 not important because as we are a wholesale club a lot of
5 products that we sell are unique to the wholesale industry in
6 the market. So a comparison between, you know, us and our
7 competitors would not necessarily be relevant. So they
8 wouldn't have a lot of reviews for products that we sold
9 through our website. So it's not considered to be that
10 important to us.

11 **Q.** In fact, if I recall your deposition testimony correctly,
12 one of the reasons why you decided not to want syndication for
13 the BJ's.com website was because BJ's wanted to go out to its
14 members and obtain reviews directly from its members. Is that
15 correct?

16 **A.** Correct.

17 **Q.** Ms. Cunningham, do you have any responsibility for BJ's
18 Facebook or Twitter pages?

19 **A.** No.

20 **Q.** Do you know if BJ's maintains a Twitter, Pinterest,
21 Facebook pages in order to try to drive awareness of its
22 products?

23 **A.** Yes.

24 **Q.** And does BJ's engage in those marketing efforts in the
25 hope that it would lead to additional sales of BJ products?

1 **MS. SCANLON:** Objection. Foundation.

2 **THE COURT:** You can answer with respect to BJ's.

3 **THE WITNESS:** Okay. It is my understanding -- again,
4 I don't manage it. It is my understanding that our objective
5 with Facebook, Twitter, et cetera, is to develop a more engaged
6 relationship with our members, thus resulting in more sales.
7 Not specific to product.

8 **MR. LIDDIARD:** Thank you. No further questions.

9 **THE COURT:** Ms. Scanlon.

10 **REDIRECT EXAMINATION**

11 **BY MS. SCANLON**

12 **Q.** Ms. Cunningham, just a few additional questions.

13 You were just asked about moderation --

14 **A.** Yeah.

15 **Q.** -- do you recall that? And you described using a partner
16 for first-level moderation. Is that correct? Who is that
17 partner?

18 **A.** PowerReviews.

19 **Q.** And did BJ's choose not to do that first level of
20 moderation itself?

21 **A.** Yes.

22 **Q.** You were also asked about going in-house with your ratings
23 and reviews?

24 **A.** Yes.

25 **Q.** If BJ's was renewing today or looking at a ratings and

1 reviews provider today would you recommend building in-house?

2 **A.** We would review it as part of the process. I would not
3 recommend it.

4 **Q.** Why not?

5 **A.** We have the same constraints that we had when we had
6 originally built the website; limited resources, limited
7 capital, et cetera. I would not believe that it would be the
8 best ROI solution for us.

9 **MS. SCANLON:** Nothing further, Your Honor.

10 **THE COURT:** Mr. Liddiard?

11 Ms. Cunningham, thank you very much.

12 **MR. BONANNO:** Your Honor, the United States calls
13 Mr. Erin Defossé to the stand.

14 **ERIN DEFOSSÉ,**

15 called as a witness for the Plaintiff, having been duly sworn,
16 testified as follows:

17 **THE WITNESS:** I do.

18 **THE CLERK:** Be seated.

19 Please state your full name and spell your last name.

20 **THE WITNESS:** My name is Erin Michael Defossé. Last
21 name is spelled D-e-f-o-s-s-é.

22 **MR. BONANNO:** Your Honor, before I begin my
23 examination may I approach the witness?

24 **THE COURT:** Yes.

25 **MR. BONANNO:** May I proceed?

1 **THE COURT:** Please.

2 **DIRECT EXAMINATION**

3 **BY MR. BONANNO**

4 **Q.** Good morning, Mr. Defossé.

5 The last time we met you were employed by Bazaarvoice as a
6 vice president of strategy. Is that right?

7 **A.** That's right.

8 **Q.** And that was at your deposition?

9 **A.** Yes.

10 **Q.** Are you still a vice president of strategy at Bazaarvoice?

11 **A.** Yes, I am.

12 **Q.** You've worked at Bazaarvoice since 2010, correct?

13 **A.** Correct.

14 **Q.** And from March 2010 until early of 2013, you oversaw
15 Bazaarvoice's product strategy team, right?

16 **A.** That's right.

17 **Q.** And there was a competitive analysis group within that
18 product strategy team that you oversaw, correct?

19 **A.** That's right.

20 **Q.** The competitive analysis group responded to inquiries from
21 Bazaarvoice salespersons in the field about competition?

22 **A.** Yes.

23 **Q.** Mr. Defossé, when did you first learn that the Department
24 of Justice was investigating Bazaarvoice's acquisition of
25 PowerReviews?

1 **A.** Ooh. Uh, it must have been -- I mean, I actually haven't
2 thought about that. It must have been -- it was during one of
3 the public statements that -- made internally in the company
4 maybe within the last year, early -- you know, nine months ago,
5 six months ago.

6 **Q.** Mr. Defossé, in your role as VP of product strategy did
7 you ever read reports that were published by a company called
8 Gartner Group?

9 **A.** Yes.

10 **Q.** And did you review these reports to learn what Gartner saw
11 the landscape for social technologies to look like?

12 **A.** Uhm, I on occasion would. Or some of the people on my
13 team might have read those. So I didn't read them all for
14 sure.

15 **Q.** And, to the best of your understanding, did persons at
16 Bazaarvoice interact with Gartner to give Gartner a better
17 understanding of Bazaarvoice's products?

18 **A.** I don't recall specifically who, but my understanding was
19 that we had conversations with Gartner and a number of other
20 analysts in the industry.

21 **MR. BONANNO:** Your Honor, may I approach the witness?

22 **THE COURT:** Certainly.

23 **MR. BONANNO:** Your Honor, this document has not yet
24 been admitted into evidence. We're going to give it the
25 exhibit number Government Exhibit 1214.

(Plaintiff's Exhibit 1214 marked for identification)

BY MR. BONANNO

Q. Mr. Defossé, this is an email that you received from a Mr. David Milam in July of 2012, correct?

A. Yes.

Q. And this was just after Bazaarvoice acquired PowerReviews, right?

A. It appears so. Yeah, that's right.

Q. Okay. And the subject line reads:

"Time sensitive reply requested Gartner first take on Bazaarvoice acquisition of PowerReviews."

Did I read that correctly?

A. Yes, you did.

Q. Sir, I'd like you to turn to the third page of the document. I believe this was an attachment to the email chain that you received?

A. Uh-huh.

Q. Sir, this is a draft copy of the Gartner report -- excuse me, strike that. This is a draft copy of the Gartner note that was published regarding Bazaarvoice's acquisition of PowerReviews, correct?

A. Uhm, based on the title of the document it appears so, yes.

Q. So Gartner actually provided Bazaarvoice with a draft copy of its note on the PowerReviews acquisition before publishing

1 it more broadly, correct?

2 **MR. FELDMAN:** Objection. No foundation.

3 **THE WITNESS:** I don't know specifically how this
4 came --

5 **THE COURT:** He can answer this question, as he is.

6 **THE WITNESS:** I'm sorry.

7 **THE COURT:** Would you repeat your answer.

8 **THE WITNESS:** I don't quite know how this came into
9 our possession, but it was in the email.

10 **BY MR. BONANNO**

11 **Q.** Now, if we turn back to the second page of the document,
12 the second page of the cover email, rather, the email at the
13 bottom of the page, there's an email from a Ms. Sherry
14 Fairchok. And at the bottom of the email her title is, Project
15 Manager Writing Department Research Operations Gartner.

16 Did I read that correctly?

17 **A.** Uh-huh.

18 **Q.** Mr. Defossé, I'd like you to turn past the draft version
19 of the Gartner note, to the second -- I'm sorry, the third to
20 last page of this whole document.

21 **A.** The third to the last is this?

22 **Q.** Yes, the Gartner note that reads at the top:

23 "PowerReviews' buy sets up Bazaarvoice for social CRM
24 market expansion."

25 **A.** Uh-huh.

1 Q. Do you see that page, sir?

2 A. Yes.

3 Q. And you received this email containing the Gartner note
4 regarding the acquisition of PowerReviews by Bazaarvoice,
5 correct?

6 A. I mean, I received the email. I don't specifically recall
7 the details of the -- of the attachments, but, yeah.

8 Q. Do you have any reason to believe you did not receive this
9 email?

10 A. No. No, I don't.

11 MR. BONANNO: Your Honor, the attachment, the Gartner
12 note, is the same as Government Exhibit 646. I would now like
13 to offer Government Exhibit 1214 into evidence.

14 THE COURT: Is there any objection to 1214?

15 MR. FELDMAN: Absolutely no foundation. He hasn't
16 established that the witness read that. He asked him if he
17 received the email.

18 And, in any event, it's hearsay within hearsay. To get
19 the statements within that document into evidence he should
20 have deposed the author, Mr. Sarner.

21 THE COURT: Your objection is overruled. There's an
22 adequate foundation for this.

23 I understand your hearsay objection. And they're not
24 offered for the truth of what Gartner says, but they are
25 offered for the fact that they were received by Mr. Defossé.

1 **MR. BONANNO:** Thank you, Your Honor.

2 **THE COURT:** So they're in.

3 (Plaintiff's Exhibit GX1214 received in evidence)

4 **BY MR. BONANNO**

5 **Q.** All right. Mr. Defossé, I would like to step back and
6 change subjects a little bit. You can set aside the exhibit
7 1214.

8 I would like to talk to you about syndication.
9 Syndication is the service that Bazaarvoice provides to its
10 clients, that allows brands to publish their reviews on a
11 retail partner's website, correct?

12 **A.** Correct.

13 **Q.** When you first joined the company, Bazaarvoice only
14 syndicated reviews collected by its brand clients to its own
15 retail clients, correct?

16 **A.** That was my understanding, but I didn't have direct
17 involvement in that product so I couldn't say for certainty if
18 that's the case.

19 **Q.** But you weren't aware of any instance where that was not
20 the case?

21 **A.** I was not aware of that, of any other instance.

22 **Q.** And Bazaarvoice's technology was originally designed to
23 only facilitate the sharing of reviews from its own brand
24 clients to its own retail clients, correct?

25 **A.** The syndication product was designed to do that. However,

1 we routinely gave brands and others access to the reviews to do
2 with it what they wanted. So the syndication product you're
3 correct.

4 **Q.** So for Bazaarvoice's syndication product it was designed
5 solely to allow Bazaarvoice's brand clients to share their
6 reviews with Bazaarvoice's retail clients, correct?

7 **A.** That was my understanding, yes.

8 **Q.** Okay. Mr. Defossé, I would like you to turn to Government
9 Exhibit 24. It should be in your binder in front of you.

10 **MR. BONANNO:** And, Seth, can we zoom in on the top of
11 the document, please. Thank you.

12 **BY MR. BONANNO**

13 **Q.** Mr. Defossé, this is an email conversation you had with
14 Bazaarvoice employees in January of 2011, correct?

15 **A.** Yes.

16 **Q.** And the subject line reads:

17 "PowerReviews talking to BV clients about
18 syndication."

19 Did I read that correctly?

20 **A.** Yes, you did.

21 **Q.** I would like you to turn to the second page of this
22 document. And we're going to focus on the email, Mr. Glass's
23 email in the middle.

24 Mr. Defossé, Mr. Glass was a member of the Bazaarvoice
25 sales organization, correct?

1 **A.** I believe so, yes.

2 **Q.** He was a manager in the sales organization?

3 **A.** I don't recall his title, but I believe he was in
4 management, yes.

5 **Q.** And Mr. Glass writes:

6 "I want to make everyone aware that PowerReviews is
7 actively going after BV clients and telling them they can
8 syndicate BV reviews to PR clients."

9 Did I read that correctly, sir?

10 **A.** Yes, you did.

11 **Q.** So at this time Bazaarvoice was aware that PowerReviews
12 was approaching Bazaarvoice's brand clients and offering to
13 syndicate Bazaarvoice reviews to PowerReviews' retail clients,
14 correct?

15 **A.** Well, I -- I was made aware of it, and Bill and his
16 leadership were. I'm not sure who else in the company was, but
17 we were aware of it.

18 **Q.** Are you aware of any other provider of ratings and reviews
19 in January 2011, or before, that was approaching Bazaarvoice's
20 brand clients and offering to syndicate Bazaarvoice reviews to
21 non-Bazaarvoice retailers?

22 **A.** No, I'm not aware.

23 **Q.** And before January 2011, are you aware of any efforts by
24 Bazaarvoice to syndicate Bazaarvoice reviews from Bazaarvoice's
25 brand clients to non-Bazaarvoice retailers?

1 **A.** I'm not aware of any.

2 **Q.** Now, at some point during your tenure as VP of product
3 strategy at Bazaarvoice, you did become involved in a project
4 to create a service to allow Bazaarvoice's manufacturing
5 clients to share their reviews with non-Bazaarvoice retailers,
6 correct?

7 **A.** Yes.

8 **Q.** Mr. Defossé, I would like you to turn to Government
9 Exhibit 28, please. It should be in your binder as well.

10 **MR. BONANNO:** Savannah, we can zoom in on the top of
11 the email to start.

12 **BY MR. BONANNO**

13 **Q.** Mr. Defossé, this is an email that you sent to Jordan
14 Yeats in June of 2011, correct?

15 **A.** That's right.

16 **Q.** And Mr. Yeats was a member of the Bazaarvoice client
17 success team. Is that right?

18 **A.** That's correct.

19 **Q.** The client success team managed Bazaarvoice's
20 relationships with its clients after a sale was made, correct?

21 **A.** That's right.

22 **MR. BONANNO:** Zoom out a little bit, Savannah, please.
23 And maybe zoom in right around where -- the subject line, "What
24 is all the fuss about?" You can zoom in on the whole
25 paragraph. Thank you.

1 **BY MR. BONANNO**

2 **Q.** So, Mr. Defossé, this is a series of talking points that
3 you planned to send to the Bazaarvoice sales and client
4 services organizations, correct?

5 **A.** That is correct, yeah.

6 **Q.** So in this paragraph you wrote:

7 "As you may have heard, PowerReviews is now making a
8 push with our client and prospect retailers claiming they
9 can syndicate content in from Bazaarvoice client
10 manufacturers."

11 Did I read that correctly?

12 **A.** Yes, you did.

13 **Q.** Okay. I'd like to focus your attention --

14 **MR. BONANNO:** Savannah, if we can pull out again and
15 focus in on, "What are we doing now?" At the very bottom of
16 this email.

17 **BY MR. BONANNO**

18 **Q.** Mr. Defossé, I'll focus your attention on the second
19 sentence, where you wrote:

20 "As such, we have convened a cross-functional team led
21 by product strategy that is formulating a new package
22 offering for syndicating content to non-Bazaarvoice
23 retailers."

24 Did I read that correctly?

25 **A.** Yes, you did.

1 Q. So you were referring to the development of a service to
2 allow Bazaarvoice's brand clients to send their reviews to
3 non-Bazaarvoice retailers, correct?

4 A. Yeah. Specifically, just to be clear, we were -- my role
5 was to envision what a service like that could look like, not
6 to actually develop a service. That would have been the job of
7 product management.

8 Q. At the time you wrote this email, no other company besides
9 PowerReviews was approaching Bazaarvoice's brand clients and
10 offering to syndicate Bazaarvoice reviews to non-Bazaarvoice
11 retailers, correct?

12 A. Well, I can't say that for sure. It had not been brought
13 to my attention.

14 Q. You are not aware of any other company?

15 A. Not that were brought to my attention, that I knew of.

16 Q. Mr. Defossé, I'd like you to turn to Government Exhibit 29
17 in your binder, please.

18 Mr. Defossé, do you recall seeing the PowerReviews Open
19 Social Commerce press release when you were VP of product
20 strategy overseeing the competitive analysis group at
21 Bazaarvoice?

22 A. Yes, I do.

23 Q. And you understood that PowerReviews was announcing its
24 service that would allow Bazaarvoice's brands to syndicate
25 their reviews to non-Bazaarvoice retailers?

1 **A.** Yes.

2 **Q.** All right. Mr. Defossé, I'd like you to turn to
3 Government Exhibit 30.

4 **MR. BONANNO:** Savannah, can we please zoom in on the
5 envelope information at the top.

6 **BY MR. BONANNO**

7 **Q.** Mr. Defossé, this is an email that you sent in July of
8 2011, correct?

9 **A.** That's correct.

10 **Q.** And the subject line reads:

11 "Urgent: Combating PowerReviews Open Social Commerce
12 Network."

13 Did I read that correctly?

14 **A.** Yes.

15 **Q.** And you marked the importance as high, correct?

16 **A.** That's correct.

17 **Q.** This was an email that you sent to the Bazaarvoice sales
18 and client services team?

19 **A.** Yes.

20 **Q.** In the first sentence of your email you wrote:

21 "This week PowerReviews announced their Open Social
22 Commerce Network."

23 Did I read that correctly?

24 **A.** Yes, you did.

25 **Q.** And you were referring to the PowerReviews press release

1 we just looked at, correct?

2 **A.** Yes.

3 **Q.** I'd like you to turn to page 4 of this document.

4 **MR. BONANNO:** Savannah, go to page 4, please. Zoom in
5 so we can see the cover slide.

6 **BY MR. BONANNO**

7 **Q.** This is the cover slide of a presentation that reads:

8 "Syndication to non-BV network retailers."

9 Did I read that correctly?

10 **A.** Yes.

11 **Q.** Mr. Defossé, you were involved in the creation of this
12 presentation, correct?

13 **A.** Yes, I was.

14 **Q.** I would like you to turn to the next page, please, sir.
15 It reads, "Competitive landscape" at the top.

16 Do you see that?

17 **A.** Uh-huh.

18 **Q.** There's a bullet point that reads, "PowerReviews," and
19 then underneath:

20 "Launched their Open Social Commerce Network."

21 Did I read that correctly?

22 **A.** Yes, you did.

23 **Q.** This is the same PowerReviews press release -- strike
24 that.

25 The Open Social Commerce Network is the same Open Social

1 Commerce Network that was referenced in the press release we
2 just looked at a moment ago, correct?

3 **A.** Yes, that's correct.

4 **Q.** If we look under the risk section on this page, the first
5 bullet point reads:

6 "We know of at least three BV manus that have signed
7 agreements with PR."

8 Did I read that correctly?

9 **A.** Yes.

10 **Q.** This refers to three Bazaarvoice manufacturing clients
11 that had signed agreements with PowerReviews to "allow them to
12 send our Bazaarvoice reviews to PowerReviews retailers,"
13 correct?

14 **A.** That's correct.

15 **Q.** The final bullet point reads:

16 "Losing control of the network diminishes one of our
17 competitive advantage."

18 Did I read that correctly?

19 **A.** Yes, you did.

20 **Q.** So at this time Bazaarvoice was concerned that
21 PowerReviews would use these syndication relationships to
22 potentially displace Bazaarvoice from its brand clients,
23 correct?

24 **A.** Well, I wouldn't necessarily put it like that. I would
25 say that we were concerned anytime PowerReviews or any other

1 competitor was knocking on the door of our clients,
2 particularly talking to our direct relationships with those
3 clients. So we wanted to make sure that they did make inroads
4 there.

5 **Q.** Mr. Defossé, I would like you to turn to the last tab in
6 your binder. It should be your deposition transcript.

7 **A.** Yeah.

8 **Q.** Do you see that, sir? And I would like you to turn,
9 please, to page 202, starting on line 25.

10 **MR. BONANNO:** Savannah, can we bring that up, please.

11 **BY MR. BONANNO**

12 **Q.** Are you there, sir?

13 **A.** Uh-huh.

14 **Q.** The question was asked:

15 "Was there concern at the time, within Bazaarvoice,
16 that PowerReviews signing syndication agreements with
17 Bazaarvoice manufacturers would diminish the value of the
18 Bazaarvoice network to its clients?

19 **"A.** So my recollection at the time of the discussions,
20 the concern was that by -- by PowerReviews establishing
21 client contractual relationships with our -- with our
22 brand clients, that they would by definition be
23 penetrating our clients and attempt" them to sell them --
24 excuse me -- "attempt to sell them more products and
25 services and potentially try to displace us from those

1 brands."

2 Did I read that correctly, sir?

3 **A.** Yes.

4 **Q.** You personally recognized that PowerReviews intended to
5 use these syndication relationships to start a dialogue with
6 Bazaarvoice's clients about purchasing other products from
7 PowerReviews, correct?

8 **A.** That was my concern. And I would have assumed so, yes.

9 **Q.** The PowerReviews Open Social Commerce Network press
10 release accelerated Bazaarvoice's efforts to develop this
11 service to syndicate Bazaarvoice reviews to non-Bazaarvoice
12 retailers, correct?

13 **A.** Well, we had already been working on this since the
14 beginning of the year, if not earlier. And when we saw this
15 press release it became clear that we had to start
16 communicating to our clients that what we were working on is
17 something that we could provide.

18 So in that sense it did accelerate our communications with
19 clients, for sure, because we had to respond to all their
20 inquiries.

21 **Q.** You felt a sense of urgency to response to the
22 PowerReviews press release. Is that fair to say?

23 **A.** I felt an urgency to respond to the inquiries from the
24 clients that were asking about it, because we were being
25 flooded with questions from our clients.

1 Q. So when PowerReviews announced its Open Social Commerce
2 Network, Bazaarvoice was flooded with inquiries about the
3 service that PowerReviews is offering, right?

4 A. And I want to just characterize "flooded." I personally
5 was getting a number of emails, and it was just hard for me to
6 manage all of them. It was, you know, in the tens or, you
7 know, that sort of number.

8 Q. I'd like you to turn to Government Exhibit 32, please.

9 MR. BONANNO: And, Savannah, can we please zoom in on
10 the second email in the document.

11 BY MR. BONANNO

12 Q. Mr. Defossé, this is an email that you sent to the
13 Bazaarvoice executive team in August of 2011, correct?

14 A. Uhm, yes.

15 Q. And the subject line reads:

16 "Update: End-of-day update on syndication and PR's
17 latest move."

18 Did I read that correctly, sir?

19 A. Yes, you did.

20 Q. "PR" refers to PowerReviews?

21 A. Yes.

22 Q. And the executive team email moniker that appears in the
23 "to" field, that was the Bazaarvoice executive team?

24 A. Yes, that would be it.

25 Q. So this would be all C-level executives?

1 **A.** Yeah. That was my understanding, yes.

2 **Q.** And C-level means chief executive officer?

3 **A.** CEO, chief marketing officer, chief revenue officer, and
4 so forth, yeah.

5 **Q.** All of the executive positions that start with a C?

6 **A.** That's right, yeah.

7 **MR. BONANNO:** I would like to zoom out, Savannah,
8 please, and then focus in on the first paragraph, first
9 sentence of Mr. Defossé's email.

10 **BY MR. BONANNO**

11 **Q.** Mr. Defossé, you wrote:

12 "There has been a lot of conversation about how we are
13 responding to PowerReviews' recent press release and more
14 generally how we plan to broadly attack them in the market
15 going forward."

16 Did I read that correctly?

17 **A.** That's right.

18 **Q.** At the time that you wrote this email to the executive
19 team in August of 2011, there was no other ratings and reviews
20 provider, that you are aware of, approaching Bazaarvoice's
21 brand clients and offering to syndicate their Bazaarvoice
22 reviews to non-Bazaarvoice retailers, correct?

23 **A.** Not that I'm aware of, correct.

24 **Q.** And if we look at what you wrote, "how we plan to attack
25 them in the market going forward," that refers to the project

1 Menlogeddon, correct?

2 **A.** I don't recall specifically that is what I meant here. I
3 know what I meant is that we were putting together a program to
4 respond to the inquiries from clients around asking about open
5 syndication network, and how we were going to train the
6 salespeople to answer questions about that, because our sales
7 team didn't know how to answer that.

8 I don't know specifically if that was referring to
9 Menlogeddon.

10 **Q.** You are familiar with the Menlogeddon project, though?

11 **A.** Yes, I am.

12 **Q.** And Project Menlogeddon was an initiative at Bazaarvoice
13 to come up with a single, coherent strategy for competing with
14 PowerReviews, correct?

15 **A.** Uhm, yes.

16 **Q.** You were the team lead for project Menlogeddon?

17 **A.** Yes, I was.

18 **Q.** And the project Menlogeddon team had responsibilities for
19 coordinating Bazaarvoice's response and marketing activities to
20 respond to inquiries regarding the PowerReviews Open Social
21 Commerce Network, correct?

22 **A.** It was one of the things that we were working on, yes.

23 **Q.** Mr. Defossé, you were involved in the creation of a
24 project Menlogeddon presentation that was given at an all-hands
25 meeting of the Bazaarvoice sales organization, correct?

1 **A.** That's right.

2 **Q.** An all-hands meeting is a meeting that brings a division
3 of the company together for informational purposes?

4 **A.** That's correct.

5 **Q.** Mr. Defossé, I would like you to turn to Government
6 Exhibit 34, please.

7 **MR. BONANNO:** Savannah, can we please zoom in on the
8 top. Thank you.

9 **BY MR. BONANNO**

10 **Q.** Mr. Defossé, this is an email that you sent to the product
11 strategy team on August 4th, 2011, correct?

12 **A.** That's right.

13 **Q.** This is just a few days after the email that we had just
14 looked at, that you sent to the Bazaarvoice executive team,
15 correct?

16 **A.** Yes, three days after that.

17 **Q.** I would like you to turn, please, to the second page of
18 this document.

19 Mr. Defossé, this is the Menlogeddon presentation you gave
20 at the all-hands meeting, correct?

21 **A.** That's correct.

22 **Q.** And you helped create this presentation?

23 **A.** Yes, I did.

24 **Q.** Can you please turn to the next page. That's the
25 PowerReviews logo?

1 **A.** That is or was, I think.

2 **Q.** Let's turn to the next page, please.

3 **MR. BONANNO:** Can we zoom in, Savannah, so we can get
4 a little bit better view of the slide.

5 **BY MR. BONANNO**

6 **Q.** At the top this reads, "Competitive Threat," correct?

7 **A.** That's right.

8 **Q.** This refers to the competitive threat posed by
9 PowerReviews. Is that correct?

10 **A.** That's correct.

11 **MR. BONANNO:** Savannah, can we slide down so we can
12 see the speaker notes for the slide, please.

13 **BY MR. BONANNO**

14 **Q.** The first bullet point reads:

15 "Aggressively going after our existing customer base."

16 Did I read that correctly?

17 **A.** Yes, you did.

18 **Q.** And underneath that it says:

19 "Open syndication network?"

20 **A.** That's right.

21 **Q.** That refers to the PowerReviews open syndication network?

22 **A.** Yes.

23 **Q.** That was announced with the press release in July?

24 **A.** That's right.

25 **Q.** At the -- the third bullet point, under "Aggressively

1 going after our existing customer base" it reads:

2 "Creating distraction and potential revenue erosion."
3

4 This refers to PowerReviews creating a distraction and
5 potential revenue erosion for Bazaarvoice, correct?

6 **A.** Yes. Generally, yeah.

7 **Q.** There's another bullet point that reads:

8 "Disrupting our new client sales efforts."

9 Do you see that, sir?

10 **A.** Yes.

11 **Q.** Underneath:

12 "Slowing down sales" and "Lowering price floors."

13 Do you see that?

14 **A.** Yes.

15 **Q.** This refers to PowerReviews slowing down sales and
16 lowering price floors?

17 **A.** It referred to -- yeah -- well, let me parse that out.

18 So, they were slowing down sales because they were
19 communicating with all of our clients, so we had to respond to
20 that.

21 And at the time they were -- because we were competing for
22 the same clients that historically we had not competed against
23 in the SMB space we were trying to figure out how to get our
24 pricing methodology to work with the smaller clients and so we
25 had to put together a pricing mechanism to do that. That's

1 what that referred to.

2 **Q.** And the last bullet point reads:

3 "Have won a handful of deals that we wanted."

4 This refers to deals that PowerReviews was winning that
5 Bazaarvoice was wanting to win, right?

6 **A.** Yes, that's right.

7 **Q.** I'd like you to turn to page 7, please. Actually, I'm
8 sorry, page 6.

9 **MR. BONANNO:** That's the right one. Sorry, Savannah.
10 We can zoom in on the slide.

11 **BY MR. BONANNO**

12 **Q.** The slide is entitled "Our response." This is the
13 Bazaarvoice response to PowerReviews, correct?

14 **A.** That's correct.

15 **Q.** And I'd like to turn to the next page, please. And you
16 had just mentioned, sir, that the reason there was price
17 erosion was that Bazaarvoice was competing for small businesses
18 that it hadn't traditionally gone after, right?

19 **MR. FELDMAN:** Objection. Mischaracterizes the
20 testimony.

21 **THE COURT:** You can correct.

22 **THE WITNESS:** Should I answer?

23 **THE COURT:** Yes, go ahead.

24 **THE WITNESS:** Thank you, Your Honor.

25 No, that's not what I said. What I said was that the --

1 going back to the -- let me make sure I got this right, the --
2 you said "price erosion."

3 What I said was that we were concerned that by them
4 getting into our clients we may -- they may steal one of our
5 clients, or that they may sell them something and, therefore,
6 create price ero- -- that it would reduce our overall revenue,
7 so it would be revenue erosion for us.

8 **BY MR. BONANNO**

9 **Q.** Mr. Defossé, I thought you said something about price
10 erosion for small businesses.

11 **A.** Yeah, but I didn't say "price erosion."

12 What I said was that what was happening at the time was
13 that we were -- we were getting ready -- you know, we were
14 actually looking at potentially doing an IPO. And the sales
15 team was looking at whether we wanted to go into the SMB space,
16 which is the space that, generally, PowerReviews had dominated.
17 Or it had a lot of number of customers in.

18 And we -- our sales team wasn't equipped to do the pricing
19 for those small clients, and we had to basically help 'em come
20 up with a pricing -- set a price-setting policy to address
21 that. So it was not an erosion issue. It was just like we
22 didn't know how to exactly price those opportunities.

23 **MR. BONANNO:** Savannah, can you zoom in on the slide,
24 please.

25

1 **BY MR. BONANNO**

2 **Q.** Mr. Defossé, which one of those clients is a small
3 business?

4 **A.** Uhm, these are all large customers, which is unrelated to
5 my previous comment.

6 **Q.** I'm sorry?

7 **A.** Fair. These are all large customers.

8 **Q.** These are all large Bazaarvoice clients?

9 **A.** Yes.

10 **Q.** And these are large Bazaarvoice that PowerReviews was
11 approaching at the time, right?

12 **A.** That's correct.

13 **Q.** And in response, Bazaarvoice wanted to immediately hold
14 QBRs with key clients. Is that right?

15 **A.** That's right.

16 **Q.** "QBR" standings for quarterly business review?

17 **A.** That's correct.

18 **Q.** In response to PowerReviews approaching these large
19 clients, Bazaarvoice also wanted to enable new syndication
20 vehicles to defend its network, right?

21 **A.** Yeah, that's what it says there, yeah.

22 **Q.** And that refers to the syndication service that we've been
23 discussing, that would allow Bazaarvoice's brand clients to
24 syndicate their reviews to non-Bazaarvoice retailers, right?

25 **A.** That was my understanding, yes.

1 Q. The last bullet point reads:

2 "Go on offense with Smart SEO."

3 Do you see that, sir?

4 A. Yes, I do.

5 Q. And Smart SEO refers to the SEO product that Bazaarvoice
6 released to close a competitive gap with PowerReviews, correct?

7 A. I don't agree with that statement. That's a product that
8 we released earlier on, well before this, that had nothing to
9 do with the competitive gap with PowerReviews.

10 Q. Okay. I would like you to turn to Exhibit 941, please, in
11 your binder.

12 A. I'm sorry, what was the --

13 Q. 941.

14 A. 941.

15 MR. BONANNO: Savannah, can we please zoom in on the
16 top email.

17 BY MR. BONANNO

18 Q. Mr. Defossé, this is an email that you sent in January of
19 2011, correct?

20 A. That's correct.

21 Q. And the subject line reads:

22 "Announcing Bazaarvoice Smart SEO."

23 Is that right?

24 A. Yes.

25 Q. I would like to focus your attention, for a moment, on the

1 email just below yours. It's an email from a Mr. Mat Thompson.

2 Do you see that, sir?

3 **A.** Yes, I do.

4 **Q.** He writes:

5 "Why is Smart SEO any different/better than PR?"

6 Did I read that correctly?

7 **A.** Yeah.

8 **Q.** And this refers to PowerReviews, correct?

9 **A.** "PR" is PowerReviews, yes.

10 **MR. BONANNO:** Savannah, can we go back up to
11 Mr. Defossé's email.

12 **BY MR. BONANNO**

13 **Q.** I would like to direct your attention, sir, to the second
14 paragraph in your email, second to last sentence, that reads:

15 "We took their idea of embedding the HTML into the
16 page so it could be crawled, but also figured out how to
17 make the content fully dynamic and not static like
18 theirs."

19 Did I read that correctly?

20 **A.** Yes, you did.

21 **Q.** When you said you "took their idea," you're referring to
22 taking PowerReviews' idea, right?

23 **A.** In the context of this email, yes, that's what I said.

24 **Q.** And then the third paragraph of this email you wrote:

25 "All this said, technically speaking, the SEO value

1 alone is actually about the same between us and PR now."

2 Did I read that correctly?

3 **A.** Yes.

4 **Q.** Before Bazaarvoice released Smart SEO, isn't it true that
5 PowerReviews had a superior SEO solution in the marketplace?

6 **A.** I don't agree with that, no.

7 **Q.** So what did you mean when you said the SEO value alone is
8 about the same now, after releasing Smart SEO between,
9 Bazaarvoice and PowerReviews?

10 **A.** I just meant that at that moment in time, we had the same
11 SEO value. The previous solution we had had the same SEO value
12 as well.

13 **Q.** So Smart SEO didn't change the SEO value offered by
14 Bazaarvoice?

15 **A.** Specifically around SEO, no. We actually had other
16 advantages in the market, but specifically around crawlability
17 it was the same.

18 **Q.** You took their idea of embedding HTML into the page. What
19 do you mean you "took their idea"?

20 **A.** So I -- you know, I wasn't involved in the development of
21 Smart SEO specifically.

22 What I was doing there is I was essentially explaining to
23 the salesperson that in the past, when we had started the
24 company, all of our content was living in the cloud, and that
25 by definition it wasn't crawlable.

1 (Reporter interrupts.)

2 **A.** I'm sorry, let me start over.

3 When we started the company, all of our content lived in
4 the cloud. And, by definition, wasn't -- the way we rendered
5 it on the page was, by definition, not SEO searchable. But, so
6 was -- you know, almost anyone else's was the same way.

7 In fact, our clients back then did not want our content on
8 their product pages because they felt that it was actually a
9 distraction to their SEO optimization efforts.

10 A few years later, the -- Google changed the way in which
11 they looked at pages. And they gave a lot of value to
12 something called "dynamic content" on pages.

13 At that point, our clients asked us, this time, to
14 actually include the content inside the page. And we went and
15 did that. And that was before Smart SEO. That was something
16 we called Search Voice Inline, which was a previous version.
17 We did that at their request. And from that moment on we had
18 the same SEO value of any other SEO solution out there,
19 including PowerReviews. And that was well before Smart SEO.

20 **Q.** So you took the PowerReviews ideas of putting the HTML on
21 the page?

22 **A.** Well, I mean, I didn't -- I had no involvement in the
23 development of that product. That was a figure of speech
24 there. I don't know how the product development team was
25 looking at that. I had no involvement in the development of

1 that.

2 Q. To the best of your understanding at the time you wrote
3 this email, isn't it true that the PowerReviews ratings and
4 reviews were embedded in the page and could be indexed by
5 Google?

6 A. At that time, yes.

7 Q. I'd like you to go back to Government Exhibit 34, please,
8 Mr. Defossé.

9 A. What was the number again?

10 Q. 34. We're going to go to page 8, please.

11 This is a slide labeled "Surgically Strike." Do you see
12 that, sir?

13 A. Yes.

14 Q. And the first bullet reads, in the speaker notes:

15 "Proactively go after their top customers."

16 Did I read that correctly?

17 A. That's correct.

18 Q. So Bazaarvoice, as a part of Project Menlogeddon, was
19 going to go on offense and pursue PowerReviews' top customers
20 and try to get them to switch to the Bazaarvoice platform,
21 correct?

22 A. That's correct.

23 Q. Mr. Defossé, at the time that you created this
24 presentation, this project Menlogeddon presentation, Pluck
25 existed, correct?

1 **A.** Yes.

2 **Q.** And Lithium existed?

3 **A.** Yes.

4 **Q.** Gigya existed?

5 **A.** I believe so, yes.

6 **Q.** And Viewpoints existed?

7 **A.** I believe -- I believe so, yes.

8 **Q.** And at the time you created this Project Menlogeddon
9 presentation, there were retailers and manufacturers that had
10 built ratings and reviews platforms with in-house resources
11 too, right?

12 **A.** Yes, that's right.

13 **Q.** At the time you wrote -- strike that.

14 At the time you created this Project Menlogeddon
15 presentation, Facebook was also in existence, correct?

16 **A.** Yes.

17 **Q.** And Twitter?

18 **A.** Yes.

19 **Q.** I'd like you to turn to Government Exhibit 40, please.

20 **MR. BONANNO:** Savannah, can we please zoom in on the
21 envelope information, please. Thank you.

22 **BY MR. BONANNO**

23 **Q.** Mr. Defossé, this is an email that you wrote to the
24 Bazaarvoice executive team in September of 2011, correct?

25 **A.** That's correct.

1 Q. You wrote that you're sending them the BV challenge
2 program -- strike that -- "the BV challenge program that the
3 Menlogeddon team is intent on launching against PR."

4 Do you see that, sir?

5 A. Yes, I do.

6 Q. "PR" refers to PowerReviews?

7 A. Yes.

8 Q. Can you turn to the next page, please. I'm sorry, if you
9 turn to page 9, it will be the color version of the
10 presentation.

11 This is a BV challenge presentation that you prepared,
12 sir?

13 A. Yes, it is.

14 Q. And you presented this to the Bazaarvoice executive team,
15 correct?

16 A. Yes, I did.

17 Q. This was the Menlogeddon team's plan to go after
18 PowerReviews' clients, correct?

19 A. It was part of the plan, yes.

20 Q. Turn to the next page. Mr. Defossé, this was the
21 Bazaarvoice plan to take it to PowerReviews, right?

22 A. That's what it says there, yes.

23 Q. Let's turn to page 12, please. Should just be a few pages
24 out. I'll read.

25 "BV targets and goals."

1 Do you see that, sir?

2 A. Yeah.

3 Q. So these were the goals of the BV challenge, right?

4 A. Correct.

5 Q. I'm sorry?

6 A. Yes, correct.

7 Q. Bazaarvoice was targeting "18 marquee and strategic
8 steals."

9 Do you see that, sir?

10 A. Uh-huh.

11 Q. Does that mean you had identified 18 marquee and strategic
12 PowerReviews clients that Bazaarvoice was going to pursue?

13 A. That's correct.

14 Q. Under the bullet point that reads, "What will we get in
15 return?" the subbullet reads:

16 "Steal a client or two, expect low win rate because of
17 switching costs."

18 Do you see that, sir?

19 A. Yes, I see that.

20 Q. Switching costs are the costs that the client must incur
21 to switch ratings and reviews providers, correct?

22 A. Cost, effort, time, yes.

23 Q. So it would be difficult to win PowerReviews clients
24 because of switching costs, right?

25 A. So what I meant here is that we expected a low win rate

1 because it was unclear to us what the switching costs were
2 going to be at each of the clients.

3 Q. But you did write:

4 "Steal a client or two but expect a low win rate
5 because of switching costs"?

6 A. That's what I wrote, yeah.

7 Q. Please turn to Government Exhibit 35. The second email on
8 this page, Mr. Defossé this is an email that you wrote to the
9 Bazaarvoice executive team in August of 2011, correct?

10 A. Uh-huh.

11 Q. Subject line reads:

12 "Menlogeddon update for the week of August 15, 2011."

13 Do you see that?

14 A. Yes, I do.

15 Q. So you were sending regular updates to the executive team
16 for the project Menlogeddon, correct?

17 A. That's correct.

18 Q. I'd like to focus your attention to the second sentence of
19 your email, that reads:

20 "Attached is the detailed project tracker if you want
21 to see the details."

22 Do you see that, sir?

23 A. Yes, I do.

24 Q. I'd like you to turn in the document just past the page
25 that reads, "Document produced in native."

1 **A.** Uh-huh.

2 **Q.** And I apologize, it's a spreadsheet that doesn't print
3 well. So we'll try to zoom in and make it a little bit easier
4 to read.

5 **MR. BONANNO:** Savannah, can you please zoom in on the
6 very top of the page.

7 **BY MR. BONANNO**

8 **Q.** Mr. Defossé, this is the activity tracker for Project
9 Menlogeddon, correct?

10 **A.** That's correct.

11 **Q.** You were responsible for creating this project tracker?

12 **A.** Yes.

13 **Q.** And as the team lead for Project Menlogeddon, you used
14 this project tracker to make sure your team members followed
15 through on the various activities for the initiative?

16 **A.** That's correct.

17 **Q.** As VP of product strategy, you never created a similar
18 project tracker for any other competitor except for
19 PowerReviews, right?

20 **A.** Actually, we did one about a year and a half earlier, for
21 both Lithium and a company called RightNow. It was a joint
22 project tracker for both of those.

23 **Q.** I'd like you to turn back to your deposition, the last tab
24 in your binder. We've going to go to page 260, starting at
25 line 25. We're going to start at line 25 and go on to page

1 261.

2 Are you there, sir?

3 **A.** Which line, again?

4 **Q.** The question actually starts on page 260, line 25, but
5 doesn't actually become fully articulated until page 261. So
6 if we -- actually, we'll start on 261, line 1:

7 "Did you, in your role as vice president of product
8 strategy, when you had responsibility for responding to
9 competitive inquiries from the field, ever create a
10 detailed project level tracker similar to that depicted in
11 Government Exhibit 35, regarding any other competitor
12 besides PowerReviews?"

13 After the question was re-read, you answered at line 1:

14 "Yeah, I don't recall having done that."

15 Did I read that correctly, sir?

16 **A.** Yes, you did.

17 **Q.** I'd like you to please turn back to the project tracker in
18 Government Exhibit 35, the slide of the Excel sheet we were
19 looking at.

20 **A.** Uh-huh.

21 **Q.** There's a couple of entries that -- excuse me. The first
22 bullet point reads, "Protect network."

23 Do you see that, sir?

24 **A.** Yes, I do.

25 **Q.** And then to the right, under "Protect our Syndication

1 Network" reads:

2 "Build marketing collateral/training for new
3 syndication approach both into and out of BV, the entire
4 solution."

5 Did I read that correctly?

6 **A.** That's correct.

7 **Q.** This refers to the development of a solution by
8 Bazaarvoice that would allow Bazaarvoice's manufacturing
9 clients to share their ratings and reviews with non-Bazaarvoice
10 retailers, correct?

11 **A.** That's correct.

12 **Q.** Okay. I'd like you to please turn to Government Exhibit
13 37.

14 Mr. Defossé, this is another update that you sent to the
15 executive team for project Menlogeddon, correct?

16 **A.** Yes, that's correct.

17 **Q.** I'd like you to please turn to the attached project
18 tracker, the third page of the tracker. I'd like to direct
19 your attention, sir, to the bottom of the page, the entries
20 that start with "Decision Tree."

21 **A.** Uh-huh.

22 **Q.** Do you see that, sir?

23 **A.** Yes, I do.

24 **Q.** I'd like to direct you to the third entry under Decision
25 Tree.

1 **MR. BONANNO:** Up one, Savannah.

2 **BY MR. BONANNO**

3 **Q.** Do you see that, sir?

4 **A.** Yes, I do.

5 **Q.** And it reads:

6 "PR is currently in 80% of our sales pipeline - all
7 sorts of different levels."

8 Did I read that correctly?

9 **A.** Yes, you did.

10 **Q.** "PR" refers to PowerReviews?

11 **A.** Yes, that's correct.

12 **Q.** Mr. Defossé, after Bazaarvoice acquired PowerReviews, for
13 some period of time you maintained responsibility for
14 responding to competitive inquiries from the field, correct?

15 **A.** That's right.

16 **Q.** After Bazaarvoice acquired PowerReviews, isn't it true
17 that there was no other competitor that was in 80 percent of
18 Bazaarvoice's sales opportunities?

19 **A.** Well, I actually wouldn't know that for certain because I
20 didn't maintain the stats on what the salespeople were
21 recording. In fact, they were particularly bad at recording
22 who was in their sales pipeline. So I can't answer that for
23 certain. But no one brought that number to my attention for
24 sure.

25 **Q.** Mr. Defossé, I'd like you to turn to Government Exhibit

1 39, please. And I'd like you to turn, please --

2 **MR. BONANNO:** Well, first of all, if we can turn the
3 page, Savannah, and get the envelope information.

4 **BY MR. BONANNO**

5 **Q.** This is an email that you received, right, Mr. Defossé?

6 **A.** Which email is that?

7 **Q.** I believe your name is listed --

8 **A.** Yeah, my name is there, yeah.

9 **Q.** So you received this email, right?

10 **A.** I don't know what this email is, but that looks like the
11 cover -- which email are you referring to? I may have lost
12 track of where we are.

13 **Q.** We're in Government Exhibit 39.

14 **A.** Is this the cover for page 1, that was sent from Tony
15 Capasso?

16 **Q.** That's correct.

17 **A.** Okay, yeah. Yes, I received that.

18 **Q.** I'd like you to turn to page 2 of Government Exhibit 39.

19 **MR. BONANNO:** Savannah, can you please just zoom in at
20 the very top of the page.

21 **BY MR. BONANNO**

22 **Q.** Mr. Defossé, this is a list of PowerReviews clients that
23 Bazaarvoice was targeting with project Menlogeddon, correct?

24 **A.** Uhm, yes, that's correct.

25 **Q.** Please turn to page 9. It will be in the colored slides

1 in the back of the attachment. It reads at the top:

2 "This is your team - PR competitive strategy
3 overview."

4 A. Uh-huh.

5 Q. Do you see that, sir?

6 A. Yes, I do.

7 Q. This was prepared as part of project Menlogeddon, correct?

8 A. Yes, it was.

9 Q. I'd like you to turn to page 11. That's entitled at the
10 top, "Defining Competitive Landscape with PR."

11 Do you see that, sir?

12 A. Yes, I do.

13 Q. Bazaarvoice had segmented PowerReviews' customers it was
14 pursuing into these categories, correct?

15 A. Can you repeat the question.

16 Q. Bazaarvoice had segmented the PowerReviews customers it
17 was pursuing into these categories, correct?

18 A. I believe this is how the sales team did it, yes.

19 Q. And if we look in each of the categories -- let's start in
20 the upper left, "PR marquee customers," there's a bullet point
21 that reads:

22 "Mostly IR100 accounts."

23 Do you see that, sir?

24 A. Yes, that's correct.

25 Q. "IR" refers to the *Internet Retailer*?

1 **A.** Yes.

2 **Q.** So this refers to the *Internet Retailer* publication --

3 **A.** Yes.

4 **Q.** -- which publishes the list, the *Internet Retailer 500*,
5 correct?

6 **A.** Yes.

7 **Q.** Again, if we look to the right, "PR strategic customers,"
8 the first bullet point reads:

9 "PR customers in the IR500 and/or strategic to BV in
10 the respective sub-vertical."

11 Again, sir, this refers to PowerReviews' customers in the
12 *Internet Retailer 500* that Bazaarvoice was pursuing as a part
13 of project Menlogeddon, correct?

14 **A.** Yes.

15 **Q.** If we look down in the bottom right, in the quadrant
16 labeled "PR competitive new business," the second bullet point
17 reads:

18 "Most likely IR500 with strategic value in
19 sub-vertical."

20 Did I read that correctly?

21 **A.** That's correct.

22 **Q.** And, again, this refers to clients of PowerReviews in the
23 *Internet Retailer 500* index that Bazaarvoice was pursuing as a
24 part of the Project Menlogeddon strategy, correct?

25 **MR. FELDMAN:** Objection. I think you misspoke. You

1 said "clients of PowerReviews." The bullet says --

2 **MR. BONANNO:** I'll strike the question.

3 **THE COURT:** Can you re-ask, please.

4 **MR. BONANNO:** Sure. I think I did misspeak. Thank
5 you, Counsel.

6 **BY MR. BONANNO**

7 **Q.** These are clients that both Bazaarvoice and PowerReviews
8 were pursuing in the *Internet Retailer 500*, correct?

9 **A.** As defined here, yes.

10 **Q.** I'd like you to turn two more pages, please, to the slide
11 that's labeled "Competitive Decision Tree." Do you see that,
12 sir?

13 **A.** Yes.

14 **Q.** At the very top -- well, strike that. There's kind of
15 four -- it's a waterfall, four different segments, right?

16 **A.** Uh-huh, yes.

17 **Q.** And these labels are the same labels we just looked at in
18 the quadrants, correct?

19 **A.** That's correct.

20 **Q.** In the very top are "PR marquee customers," correct?

21 **A.** That's right.

22 **Q.** And the first bullet point reads:

23 "Win at all costs."

24 Did I read that correctly?

25 **A.** Yes.

1 Q. So these were the PowerReviews customers that Bazaarvoice
2 was going after and was willing to win at all costs, right?

3 A. I mean, that's what the slide says, yes.

4 Q. So Bazaarvoice was willing to do whatever it took to win
5 those accounts, right?

6 A. I actually don't know if that's -- first of all, I didn't
7 prepare this slide. I don't know what exactly is meant by "win
8 at all costs." This is the salesperson's perspective: Look,
9 we're going to do everything we can to win these accounts.

10 So I don't know what was meant or if there was approval
11 beyond the sales team of what "costs" meant.

12 I just wanted to clarify that, so.

13 Q. Sir, sitting here today, are you aware of any Viewpoints
14 customers that Bazaarvoice is trying to win at all costs?

15 A. In this -- at that timeframe? No.

16 Q. Let me re-ask the question. I think we talked past one
17 another there.

18 As we sit here today, are you aware of any Viewpoints
19 customer that Bazaarvoice is trying to win at all costs?

20 A. Since I'm no longer involved in that, I wouldn't know, no.

21 Q. Based on your experience in the industry, do you have any
22 understanding as to whether Viewpoints has any ratings and
23 reviews clients today?

24 A. I haven't followed them in a couple of years, so I don't
25 know.

1 Q. That would even go back to your tenure when you were VP of
2 project strategy?

3 A. Well, when I joined the company, they had Sears. And I
4 know that was something that we were very interested in, but
5 that's all knew.

6 Q. As we sit here today, you don't know whether they're still
7 servicing Sears or not?

8 A. My understanding is that they're not.

9 Q. Are you aware of any other Viewpoints customers?

10 A. No, I'm not aware.

11 Q. Mr. Defossé, when PowerReviews first started approaching
12 Bazaarvoice's brand clients and trying to get them to send
13 their reviews to PowerReviews' retailers, Bazaarvoice tried to
14 stop that, right?

15 A. Tried to stop it in what way?

16 Q. Tried to stop PowerReviews from sending Bazaarvoice's
17 manufacturers' reviews to PowerReviews' retail clients, right?

18 A. Well, PowerReviews couldn't do that. It was the clients
19 were doing that. So PowerReviews wasn't taking the content.
20 It was the clients sending the content to the retailers.

21 So we weren't stopping PowerReviews from anything. It was
22 a brand would choose to send their data to a retailer. And
23 they could do that. That was well within our contracts, and
24 they did it from time to time.

25 We didn't want them to do that because we felt we had a

1 better solution for it, but we didn't stop PowerReviews from
2 doing anything.

3 **Q.** So Bazaarvoice never did anything to inhibit PowerReviews'
4 ability to provide this service to Bazaarvoice's brand clients?

5 **A.** Oh, it was out of our control to inhibit them. The brands
6 could give them the content, PowerReviews, without anything.
7 There were some occasions where PowerReviews wanted us to enter
8 into contracts with them to do it, and we certainly didn't want
9 to do that.

10 **MR. BONANNO:** Your Honor, may I approach the witness?

11 **THE COURT:** Yes.

12 **BY MR. BONANNO**

13 **Q.** Mr. Defossé --

14 **MR. BONANNO:** And, Your Honor, this exhibit has not
15 been admitted into evidence yet. It's going to be labeled
16 Government Exhibit 1215.

17 (Plaintiff's Exhibit 1215 marked for identification)

18 **BY MR. BONANNO**

19 **Q.** Mr. Defossé, this is an email chain that you participated
20 in in April of 2012, correct?

21 **A.** Yes, that's correct.

22 **Q.** And this was just before the merger, right?

23 **A.** Yeah, sounds about right, yeah.

24 **Q.** In the middle there's an email from Mr. Bill Glass. Do
25 you see that, sir?

1 **A.** Yes, I do.

2 **Q.** And you wrote -- strike that. Let me wait one second.

3 **MR. FELDMAN:** I think there's stuff in here that the
4 customer involved might be unhappy about with pricing
5 information. So I don't think you want to flash it.

6 **MR. BONANNO:** We haven't put it on the screen.

7 **MR. FELDMAN:** I think you want to be careful on the
8 data because if they were here they would be squawking.

9 **THE COURT:** Thank you, Mr. Feldman.

10 **BY MR. BONANNO**

11 **Q.** So turning back to Mr. Glass's email, he's describing a
12 delay strategy to slow down the process for allowing a
13 Bazaarvoice brand client to syndicate content to a PowerReviews
14 retail client. Isn't that right?

15 **A.** My understanding is, as I read this, is that we had been
16 asked to sign some agreements for us to send content to the
17 retailer, and we definitely wanted to review those very
18 carefully and redline them.

19 **Q.** So when you received this email referring to a delay
20 tactic with a heavy set of redlines, you didn't interpret that
21 to mean we should inhibit syndication from our clients to
22 PowerReviews' retailers?

23 **A.** So, no, that's not how I interpret it at all, actually.

24 I mean, the reality of the matter in this particular case,
25 P&G had complete contractual ability to send content to a

1 drugstore or whoever they wanted to.

2 The issue here was that PowerReviews wanted us to sign an
3 agreement with them and P&G giving -- essentially giving
4 PowerReviews contractual relationship with P&G, who was our
5 customer, and we didn't agree with that.

6 So we wanted to make sure that we poured through that
7 contract in every way, to make sure our interests in those
8 clients were protected.

9 **Q.** So how does that align with this being a delay strategy?

10 **A.** Well, we wanted -- we didn't want to have PowerReviews
11 signing an agreement with P&G, and we wanted to convince P&G
12 they should let us do the syndication rather than PowerReviews
13 because it's our client. And, again, P&G could have said no to
14 us, and they could have gone directly with PowerReviews and
15 giving them the content. But we didn't want to be party to a
16 contract where we weren't even going to get paid, and we were
17 going to have to do a lot of work and have potential legal
18 exposure because of the fact we were participating in the
19 syndication, and we wanted to make sure that we -- that we
20 covered all our bases with that, to make sure that we weren't
21 exposed.

22 **Q.** Mr. Defossé, how did that provide value to your client,
23 that strategy?

24 **A.** So, our position all along on syndication is that a client
25 has always been able to take their data that we provide, that

1 we collect on their behalf, and they can syndicate it on their
2 own to whoever they want. That is without using our
3 syndication product. We've always believed that our
4 syndication product was better than them doing that because we
5 could do things for them that they couldn't do on their own.

6 In this particular case, they wanted us to essentially
7 send them -- to send raw data to PowerReviews, contractually
8 sign up to do that. They'd essentially not be able to use our
9 product, in order to ensure the quality of the reviews once
10 they showed up on the retailer page. And we were concerned
11 that that was actually going to be detrimental to P&G.

12 For example, we send reviews for a bar of soap, and they
13 show up on the page for shampoo. And then we -- since we had
14 no control over how PowerReviews was going to put them on
15 there, we could end up being liable for that mistake. And we
16 didn't want to be part of that.

17 And we told P&G that we felt that the best solution was to
18 go entirely with our solution and not with PowerReviews. Now,
19 they could have chosen to ignore us and gone directly to
20 PowerReviews and given them the content. They had all the
21 rights to do that.

22 **Q.** So let me just back up and make sure I have the sequence
23 of events straight. A Bazaarvoice client approached you and
24 asked you to sign this agreement with PowerReviews, to enable
25 syndication, correct?

1 **A.** Yes.

2 **Q.** And in response you sent the contract as a part of a delay
3 tactic through a set of heavy legal redlines, correct?

4 **A.** Okay. Can you repeat that question?

5 **Q.** In response to this request from your client, you went
6 into a delay tactic with a heavy set of legal redlines,
7 correct?

8 **A.** That's what I said there, yes.

9 **MR. BONANNO:** I have no further questions right now,
10 Your Honor.

11 **THE COURT:** Why don't we take our next break here, for
12 ten minutes. And I'm going to want to stop very close to
13 1:00 o'clock today, so keep that in mind.

14 **MR. FELDMAN:** So from the standpoint of this witness,
15 it will take me well under an hour.

16 **THE COURT:** Okay. Great.

17 (Recess taken at 10:55 a.m.)

18 (Proceedings resumed at 11:05 a.m.)

19 **CROSS-EXAMINATION**

20 **BY MR. FELDMAN:**

21 **Q.** Good morning, Mr. Defossé. I guess given all the military
22 imagery, I should be grateful you didn't come dressed in camo.

23 I handed up to the judge and to you a bio. Could you just
24 start -- let's start with your educational background before
25 work.

1 **A.** So I have an undergraduate degree in aerospace engineering
2 from the University of Texas, which I received in 1993.

3 I then proceeded to get a Master's in aeronautics and
4 astronautics from Stanford just around the corner here, which I
5 got in 1995.

6 And then I received an MBA from the University of Texas in
7 1998.

8 **Q.** And then could you give us your job background briefly?

9 **A.** Yeah. So my first job out of college was working at
10 NASA's Jet Propulsion Laboratory in Pasadena, California, which
11 is the part of NASA responsible for all their robotic space
12 missions, the Rover on Mars, all that sort of stuff, and it was
13 my dream job even from when I was a kid. So I got that. I
14 started working there in 1991, and was there on and off through
15 1996. I say "on and off" because I did my Master's in between
16 my tenure there.

17 **Q.** You're going to make the reporter's fingers fall off.

18 **A.** I'm sorry.

19 **Q.** Can you slow down?

20 **A.** I will go slower.

21 After I left the Jet Propulsion Laboratory and I was
22 getting my MBA, I finalized my MBA; but during that time, I
23 started a company while I was getting my graduate degree, a
24 company called Isochron.

25 **Q.** How do you spell it?

1 **A.** I-S-O-C-H-R-O-N.

2 And I was one of the two cofounders and the chief
3 technology officer of that company. I was there for roughly
4 seven years in that capacity.

5 And after I left Isochron, the company was sold to a group
6 of investors and I left shortly thereafter, about a year after
7 that.

8 And after trying to figure out what I was going to do
9 next, I ended up going to work at a technology incubator based
10 in Austin, Texas, a nonprofit technology incubator that helps
11 startup companies write their business plans, go and raise
12 venture capital, and so forth. I was there around five years.

13 When my tenure there ended, I -- I did a little bit of
14 consulting for a software company. I was their acting chief
15 product officer, a company called Ediomá with an E,
16 E-D-I-O-M-A, and it was a company developing mobile
17 applications for the Hispanic market in the United States.
18 Actually all over Latin America, which was a natural for me
19 because I grew up in Mexico and I spoke Spanish, and I knew all
20 the cultural topics that needed to go into the product.

21 So I was there for about a year and a half doing
22 consulting work; and as I was doing that, my next job, so to
23 speak, was to start an elementary school. So I decided that I
24 wanted my kids to go to a school that had a certain set of
25 things that I wanted them to have: Multilingual education,

1 international curriculum, and things like that. I couldn't
2 find it in my community, so I started an elementary school. So
3 I was doing that for about a year and a half nonprofit, unpaid.

4 And, you know, at some point in time after we got that
5 started, it's grown very successfully, and then -- but I needed
6 a job after awhile doing that, and I ended up at Bazaarvoice.

7 **Q.** So did you take the elementary school public or sell it to
8 IBM?

9 **A.** Yeah.

10 **Q.** Only kidding.

11 What is your title at Bazaarvoice?

12 **A.** Yeah. I'm the vice president of strategy.

13 **Q.** Has that pretty much been your job the whole time there?

14 **A.** Yeah. I mean, there's been some changes in the role,
15 particularly after Mike Svatek, who was my -- who hired me as
16 director of product strategy. I started -- the role went
17 through some changes during the time he was there, but pretty
18 much did about the same thing.

19 And then with Mike's departure, it's, again, transformed.
20 It's changed a little bit. For example, I no longer have
21 responsibility for the whole competitive analysis. That's now
22 within product marketing.

23 **Q.** Try to keep your voice up and slow for our friend here.

24 **A.** Yes.

25 **Q.** As head of strategy for the company, are you familiar with

1 the term "social commerce"?

2 **A.** Yes, I am.

3 **Q.** In the last few years, two, three years, how would you say
4 that the options available to chief marketing officers at
5 eCommerce companies have changed with respect to social
6 commerce?

7 **A.** Well, I mean, the social commerce market has really
8 exploded, I mean, from a few years ago where there was not much
9 available till now. Probably hundreds of companies that
10 provide a variety of solutions.

11 And, so, there's plenty of things that chief marketing
12 officers are looking at. For example, you know, some of the
13 better known things are, of course, Facebook and Twitter, which
14 were big -- big aspects of the social commerce -- social in
15 general that are now also playing a part in social commerce.

16 There have been companies that have actually been created
17 to serve or, indeed, to work with Facebook and Twitter. Some
18 of those companies have been bought by some of the larger
19 companies around, like Salesforce and Oracle. So there's a lot
20 of change and a lot of growth and a lot of -- I mean, literally
21 every month or so it's new companies with new capabilities
22 pitching to CMOs and others.

23 **Q.** I'm going to hand to you an exhibit that the Government
24 marked. It's GX18, one eight. Have you seen that document
25 before?

1 **A.** Yes, I have.

2 **Q.** Can you give us context for what it is?

3 **A.** So as part of my responsibility overseeing the competitive
4 analysis, one of the things that we wanted to do was always
5 reach out to our salespeople who were in the field talking to
6 customers and find out, you know, who are all these companies
7 that they were seeing in this competitive landscape that, like
8 I said, every few months there was a new company showing up.

9 And, so, I'd asked -- and we, I think -- I believe I did
10 this a couple times, but in this email I had asked one of
11 the -- one of the people -- one of the key members that works
12 for me to issue a survey out to the Sales Team asking them,
13 like: What competitors are you currently seeing in the market?
14 Are you finding them in -- you know, bidding against you for a
15 new opportunity? Are you finding that they're potentially not
16 bidding against you directly but they are -- they're bidding
17 for some of the budget that your potential client has to spend?
18 And essentially give us information on that.

19 **Q.** So I want to ask you about exactly that sentence. You
20 wrote -- this went to Yun Du, is that Mr. Yun Du or Ms. Yun Du?

21 **A.** Mister.

22 **Q.** Okay. You wrote Mr. Yun Du, quote: (reading)

23 "I would try to get the respondents to differentiate
24 between direct competitors (bidding for the exact same
25 business and capability set) versus wallet competitors

1 (bidding for the same wallet with a different solution)."

2 What were you talking about?

3 **A.** So we were trying to figure out how to categorize
4 competitors because there were so many new companies coming
5 into being and so many different solutions that on one extreme
6 were companies that had a product that was exactly like our
7 ratings-and-reviews feature, for example, or exactly like our
8 Q & A solution, or exactly like our stories. By the way, none
9 of them were exactly the same all the time but, you know, very
10 similar functionality.

11 On the other side, there were companies that may have had
12 a completely different way to address social commerce and our
13 clients were actually considering should we do a Q & A
14 solution, should we do a review solution, or should we use
15 their new way of doing this.

16 So we were trying to get -- create buckets and allow the
17 Sales Team to tell us with more specificity, is this new --
18 does this new client have a ratings-and-reviews functionality
19 or is it something new that we haven't seen that they're also
20 vying for the business.

21 **Q.** Does Amazon affect your business?

22 **A.** Very much so.

23 **Q.** How?

24 **A.** Well, I mean, Amazon, first of all, essentially created
25 the concept of reviews or commercialized the concept of

1 reviews. Most consumers today at one point when they're going
2 to buy anything online end up looking at Amazon, the reviews
3 that are there and, in addition, to potentially the reviews
4 that we host for our clients on their Web sites.

5 The other big, you know, factor that Amazon has in our
6 business is that, I mean, they're competing directly with our
7 retail customers. So there have been incidences where Amazon
8 decides to go into a new industry area or a new products --
9 product area and category, and immediately impact the revenues
10 of retailers.

11 And the reason they can do that is because they have a
12 direct model. You know, you go online to buy. You don't have
13 to have stores. And, so, all of our retailers are always very
14 concerned about Amazon coming into their categories because
15 they know that it will take revenue away from them.

16 **Q.** Have you heard of something called Amazon Webstores?

17 **A.** Yes, I have.

18 **Q.** Can you explain what that is?

19 **A.** Yeah. So Amazon has a product that allows retailers to
20 embed review functionality, as well as some other checkout,
21 like, you know, pay -- pay now and leave your credit card, the
22 checkout process, into their pages and use that functionality.

23 **Q.** So if a company doesn't want to use Bazaarvoice for
24 ratings and reviews, do you understand it to be an option for
25 them to go use Amazon Webstore and get ratings and reviews via

1 that?

2 **A.** Depending on the customer, yes. It may not work for all
3 of them, but certainly it's an option for customers.

4 **Q.** To what extent, if any, do you view in-house development
5 of ratings-and-reviews software as an alternative to your
6 product?

7 **A.** Well, in every, that I am aware of, in every survey that
8 we did, like the one I'm -- that we were pointing out in the
9 email, other than our -- other than our prospects just not
10 wanting reviews, the single biggest factor or one of the single
11 biggest factors why they ended up not buying our product was
12 because they decided to build it themselves. So it's a big
13 competitor, if you will.

14 **Q.** Do you remember Mr. Bonanno asked you about ViewPoint and
15 Sears?

16 **A.** Yes, I do.

17 **Q.** And you told him that -- I think you told him that you
18 thought Sears was no longer a customer of ViewPoint; is that
19 right?

20 **A.** That's correct.

21 **Q.** Where did they move to?

22 **A.** My --

23 **MR. BONANNO:** Objection. Foundation.

24 **BY MR. FELDMAN:**

25 **Q.** Do you know where Sears moved their ratings and reviews

1 to?

2 **A.** My understanding is they built their own solution.

3 **Q.** Okay. Thank you.

4 I want to turn to competition prior to the acquisition.
5 What segments of companies did Bazaarvoice target for its
6 ratings-and-review products?

7 **A.** So, you know, at a very high level, we divided the world
8 into brands and retailers; and then within those, we would
9 generally divide them up into, you know, big companies and
10 small companies: Enterprise, we use the word "enterprise," and
11 SMB, and commercial. You know, three different tiers.

12 And then within brands and retailers, we'd have industry
13 areas like travel or clothing or electronics. But at the --
14 you know, how we organize ourselves for many years in the
15 company was around saying do you have brands, retailers, small
16 companies, large companies.

17 **Q.** And in those different segments you described, prior to
18 the acquisition, what would you say PowerReviews' competitive
19 presence was in the different segments?

20 **A.** Yeah. So my understanding was that they had a lot of
21 presence in the small and commercial, what we call commercial,
22 which is intermediate size retail space. They had a few
23 enterprise retail customers, large retail customers, only a
24 handful.

25 And by comparison, we had a lot of clients that were both

1 in brands, which they didn't generally have, as well as many
2 large enterprise and commercial retail clients.

3 Q. Okay. I'm going to hand up to you a document the
4 Government marked. I think it may have even made it into the
5 Complaint and onto Reuters, GX540.

6 A. (Witness examines document.)

7 Q. Are you familiar with the document?

8 A. Yes, I am.

9 Q. Did you write the front part?

10 A. Yes, I did.

11 Q. The subject line is "BBY Feedback on RFI." What does that
12 mean?

13 A. BBY is the ticker symbol for Best Buy retailer, and RFI is
14 a request for information; and, so, we were responding to an
15 RFI that BBY had issued to us.

16 Q. So before I ask you about some of your colorful language
17 here, can you give us the context of what was going on with
18 Best Buy in July of '11?

19 A. Yeah. So, you know, this is the summer of '11 and, so,
20 the context for all that was, this is all around the same time
21 that PowerReviews had issued their open social commerce
22 release.

23 A few -- you know, starting a few months back, their chief
24 marketing officer, Cathy Halligan, had -- my understanding was
25 that she had taken it upon herself to leverage her previous

1 position at Walmart and her Rolodex from that position to call
2 all of our top clients directly; and she could do that because
3 she had their direct contact information, they knew who she
4 were -- who she was, and essentially, you know, ask them to
5 reconsider, you know, their decision to be with Bazaarvoice and
6 to consider PowerReviews.

7 Other things that were happening were that we had just
8 finished our -- a few months before we had finished our annual
9 customer summit, and PowerReviews had -- this is industry
10 lingo -- they had hijacked our Twitter handle, which is the --
11 when people at a conference start talking about the conference
12 and we issue information about the conference, generally it
13 comes from us; but if someone hijacks your handle, they can
14 essentially write information to all the attendees of the
15 conference and pretend that they are you.

16 And, so, there was just a lot of, you know, competitive,
17 you know, I guess angst or just, you know, we were upset about
18 all this.

19 And they contacted Best Buy, and then Best Buy -- well,
20 she contacted Best Buy and had convinced our prime -- the GM
21 that was responsible for our account, for our relationship with
22 Best Buy, to issue an RFI essentially, you know, our
23 understanding was, for us to reexplain our relationship to them
24 and what our products were.

25 **Q.** And how did it play -- I'm going to get to this in a

1 minute --

2 **A.** Yeah.

3 **Q.** -- but what happened in that process? Did you meet with
4 them? Did you keep the business, lose the business? What
5 happened?

6 **A.** Yeah. So we got the RFI, and actually Best Buy had asked
7 us, you know, like, "What do you think we should be asking in
8 the RFI," which was interesting.

9 And we went through that process, you know, answered all.
10 We had a team of five to ten people that were responsible for
11 answering the various questions in the RFI; and then flew a
12 team, including myself, it must have been about a dozen people,
13 to Minneapolis where Best Buy is headquartered. It was myself,
14 Aaron Nelson who at the time was the chief marketing officer at
15 Bazaarvoice, our head of our labs team; and, you know, anyway a
16 number of people flew up there.

17 And we spent the day talking to Best Buy and essentially
18 telling them about what our road map was. That was -- most of
19 the conversation was about what new products we were developing
20 and, you know, what we were developing.

21 And at the end of that day, I mean, I didn't hear anything
22 else. Essentially we -- the business stayed with Bazaarvoice
23 and we continued on the relationship with them, so....

24 **Q.** Okay. Now let me turn to your document, and I'm going to
25 read you a few sentences, and then you can talk about them.

1 Quote: (reading)

2 "I was actually talking about that today in reaction
3 to the BBY RFI and their apparent need to 'better
4 understand the social commerce market' given that they
5 haven't done it proactively in at least the four years
6 plus that they've been with us," closed quote.

7 What did you mean by that?

8 **A.** You mean that or the entire --

9 **Q.** That sentence. What did you --

10 **A.** That specific sentence?

11 **Q.** Yeah.

12 **A.** Okay. So in the communication that we got from Best Buy
13 in their RFI, what they had told us they wanted to hear from us
14 was that they, quote, "better want to understand the social
15 commerce market." So that's essentially what they told us.

16 And, however, my -- my read on the questions they were
17 asking us had nothing to do with social commerce market. It
18 had to do they just wanted to know what our product and feature
19 road maps was for our ratings and reviews and QA products.

20 **Q.** Okay. You then go on to say, quote: (reading)

21 "My take is that there really isn't a market for them
22 to understand (as it relates R & R), it is us or
23 PowerReviews and in the game of big clients, we win. Here
24 is why:

25 "One, elephants don't mate with bunny rabbits."

1 And then you go into that. (reading)

2 "And, two, our product vision and strategy is an
3 enterprise strategy. PR's is a software tool strategy,"
4 closed quote.

5 Can you disaggregate all that? For example, what did you
6 mean by, "... there isn't really a market for them to
7 understand... it is us or PowerReviews"?

8 **A.** Yeah. Well, to be honest, I was actually a little bit
9 upset at this whole RFI that got sent out to us because it
10 seemed a little bit disingenuous that they were asking us to do
11 all this work to better understand the social commerce market
12 when it was clear from the questions that what they really were
13 asking us to do is basically compare ourselves to PowerReviews,
14 because that was motivated -- in my understanding was that this
15 whole thing was motivated off of Cathy Halligan making a call
16 into our customer.

17 So what I meant by "there isn't a market for them to
18 understand" is it didn't seem to me that they had any interest
19 or were really looking to understand social commerce. They
20 just wanted us to explain to them how our features compared to
21 PowerReviews. So that's what I meant by that part.

22 Do you want me to continue on with the --

23 **Q.** Yeah. What did you mean by "it is us or PowerReviews"?

24 **A.** Well, it was clear to us, and we knew from our
25 relationships with Best Buy, that this whole exercise had been

1 motivated by Cathy Halligan calling and asking us to compare
2 ourselves against them. So it was obvious to everyone that
3 really this wasn't a social commerce market understanding
4 exercise. They just wanted to do a comparison between us two;
5 and we were the only, as far as I knew, the only people that
6 that they were even contacting for the RFI.

7 **Q.** What did you mean, "In the game of big clients, we win"?

8 **A.** So, as I mentioned earlier, you know, we -- we tended to
9 service large clients and PowerReviews tended to serve smaller
10 clients. And the reason that we ended up -- the market ended
11 up looking like that, I mean, the industry kind worked like
12 that, is because we -- we designed our product to be very
13 customizable for very large clients; whereas, the PowerReviews
14 solution was more of a turnkey offering for smaller clients.

15 And not only that, because there was a lot of
16 customization, it also meant that we needed to have a pretty
17 significant client support team that would be working with
18 these large clients, and it was addressing all sorts of things:
19 Day-to-day issues with the software, customizations that they
20 wanted made, just a lot of handholding with these very large
21 clients that wanted -- you know, we used to say that all of our
22 large clients wanted to be pixel perfect; that they wanted
23 everything to be exactly the way it wanted to. And, so, we
24 have to spend a lot of time and effort doing that.

25 So we -- we had -- the company -- or we have a company, we

1 had built a company around being able to service large clients,
2 and we felt that we were better able to do that than
3 PowerReviews could.

4 And in my experience dealing with clients of that size,
5 clients wanted to deal with a company that was the size of
6 Bazaarvoice because they knew that we had all the client
7 support people, all the technical support people, all the, you
8 know, engineers that if we need -- that we had all the
9 engineers if we needed to fix something that got broken.

10 Q. Okay. Thank you.

11 Down in the middle you go off on, "Joint Strike Fighter.
12 Kill Bin Laden." What's that all about?

13 A. Well, you know, the Bazaarvoice -- I mean, actually pretty
14 much all sales teams in software are full of male bravado, and
15 this is kind of how it is; and just typical salesmen love that
16 sort of talk. When you talk about you're going to fly the
17 Starship Enterprise with the phasers turned on, they love that
18 conversation. So --

19 Q. I hate to disillusion you, but sometimes bravado is even
20 known among litigators, not just salespeople.

21 A. Okay.

22 Q. When you said, "It is us or PowerReviews," did you mean
23 there were no other companies from which a customer could buy
24 ratings-and-reviews software?

25 A. No, that's not what I meant.

1 Q. Okay. Let me hand you Government Exhibit 837.

2 A. (Witness examines document.)

3 Q. Have you seen that before?

4 A. Yes, I have.

5 Q. In the middle there's an email to you from Mr. Yun Du, as
6 we've established, called "Battle Cards for our Top
7 Competitors" --

8 A. Yes.

9 Q. -- and they list a bunch at the bottom. Was it your
10 understanding that those companies were relevant to the
11 competitive environment for Bazaarvoice as of October '11?

12 A. Yes, absolutely. That's correct.

13 Q. Why were you preparing -- what are battle cards for
14 competitors?

15 A. So as part of the competitive analysis team, one of the
16 things that we did is that we would maintain a document or
17 multiple documents that would describe the capabilities and the
18 background of each of the companies that we deem to be
19 competitive; and we would, you know, on some basis update
20 those, you know, if there was a press release issued by -- by
21 that company, and so forth.

22 And these battle cards were then made available to the
23 Sales Team and the client support team in case they were in a
24 call with a customer and the customer said, "Oh, I'm looking at
25 this other solution. What do you know about it?" And the

1 salesperson could quickly reference it and have the information
2 they needed to be -- appear intelligent and make
3 recommendations.

4 **Q.** Thank you.

5 Back to Menlogeddon. Did Menlogeddon involve product
6 innovation on your part or was it a different type of
7 initiative?

8 **A.** So the major thrust behind Menlogeddon was -- were two
9 things. One, we wanted to make sure that none of our marquee
10 clients, none of our top clients or big clients that
11 Cathy Halligan had called actually ended up -- you know, we
12 ended up losing them. Because we were preparing for an IPO and
13 we felt it would look very bad if all of a sudden in the middle
14 of the IPO road show, Home Depot were to go to PowerReviews.
15 So we were very concerned about that.

16 So that was the number one priority was we've got to
17 defend all of our clients. That's why we issued QVRs and just
18 make sure that all of our existing clients are happy.

19 The second major element was to ensure that the
20 Sales Team, as they were going into these competitive new
21 client situations that I think were referenced in one of the
22 segments that were brought up earlier, that they had the right
23 tools to be able to sell into that client segment.

24 Because most of our -- because what they were doing at
25 that time included selling into the small retailer space, we

1 needed to give them essentially new tools to be able to do that
2 because we historically hadn't -- I mean, we mainly serviced
3 larger clients historically. So that was the second thing.

4 And then the third thing was, indeed, to dispel any
5 concerns that our client had about this open syndication
6 network.

7 **Q.** The folks at Bazaarvoice seemed to have very passionate
8 feelings about PowerReviews in 2011. Why do you think that
9 was?

10 **A.** I think it was the combination of all these things
11 happening at the same time. You know, we show up at our
12 conference and all of a sudden all of our clients are getting,
13 you know, misinformation from PowerReviews in the middle of
14 our, you know, retail -- of our client conference.

15 All of a sudden we start getting, you know, emails from
16 our -- many of our large clients saying, "Hey, you know, I've
17 been contacted by the CMO at PowerReviews and we should talk."

18 Anything -- anything like that is -- you know, puts the
19 client success team in any company will make them paranoid
20 because their job is to maintain those accounts.

21 So there was a lot of talk about that; and, yeah, so there
22 was just a lot of marketing, a lot of press, and a lot of
23 things happening.

24 **Q.** Would you say that in 2011 PowerReviews was successful in
25 getting under your skin?

1 **A.** Absolutely.

2 **Q.** Were they successful in stripping away any major
3 customers?

4 **A.** Not that I'm aware of.

5 **Q.** Okay. I want to talk about In-Line SEO and regular SEO.
6 I know you're a rocket scientist, but I want you to bring it
7 down a notch.

8 Could you explain the differences between how Bazaarvoice
9 handled search engine optimization and PowerReviews did?

10 **MR. BONANNO:** Objection. Foundation.

11 **BY MR. FELDMAN:**

12 **Q.** Are you familiar with how Bazaarvoice handled search
13 engine optimization?

14 **A.** Yes, I am.

15 **Q.** Are you familiar with how PowerReviews claimed to handle
16 search engine optimization?

17 **A.** Yes, I am.

18 **Q.** What were the differences?

19 **A.** So -- yeah. So I'm going to try to be as, you know, not
20 as technical and try to put it in normal terms.

21 The way in which our products were built were completely
22 different. We built our solution with the idea that we wanted
23 to host all the software on our servers, and PowerReviews built
24 their solution with the idea that they were going to be sending
25 data to the servers of their clients that would then show their

1 reviews. So that's sort of the big picture, hosted versus
2 nonhosted, was kind of like -- and there's some nuances there,
3 but essentially that's the big picture.

4 So when SEO became all of a sudden an important topic for
5 our clients, the first thing that they asked -- and what I mean
6 by "SEO," I mean In-Line SEO and I'll explain that in a
7 second -- we had to figure out how do we actually allow review
8 content that is being hosted by us to be seen by Google.

9 And the issue there is that when Google goes onto a Web
10 site of one of our customers, if we were hosting the reviews on
11 our Web site, Google can't see those reviews. This is how
12 technically -- you know, this is how it used to work.

13 Our clients had historically actually not wanted us to put
14 the reviews on their pages because in the 2005-2006 time frame,
15 there was a lot of companies that had spent a lot of time doing
16 something called SEO optimization; and what that means is that
17 they were tailoring the pages that they had for their products
18 and putting in the right words that they felt were the words
19 that Google was going to pick up, and it was going to use to
20 give them a high ranking.

21 However, I think it was 2008 or 2009, I don't remember the
22 exact date, Google did a change in the way in which they ranked
23 pages and they now said, "Well, in addition to being optimized,
24 you have to have fresh and dynamic content on your page." That
25 led to this whole In-Line SEO topic. Which the question was:

1 If we need to have dynamic content on the page, why don't we
2 put reviews on the page? Because those are the pieces of
3 content that are always changing and, therefore, Google was
4 going to like that.

5 Okay. So we got that request from our clients, and we
6 developed a solution called SVI, SearchVoice Inline, which what
7 it did essentially was it took the reviews that we were
8 collecting, we would ship them, we would electronically ship
9 the files of the reviews, the reviews, the review content, to
10 our client and then they would include those reviews in their
11 Web pages, in their product pages.

12 When a consumer would show up and see the page, what would
13 happen is that we have software that would determine, "Are you
14 a human reading this or are you Google reading it?" If you
15 were a human reading it, then what we would do is we would go
16 back to our servers and we would show the consumer the most
17 recent reviews.

18 And we felt that that was a big advantage over the way
19 PowerReviews did it, because we could get the In-Line SEO
20 component, Google could see now the reviews, but we would also
21 give the consumer the most recent reviews; and we innovated
22 that with something called SVI, which was the predecessor to
23 Smart SEO.

24 What PowerReviews was doing all along was doing only the
25 part where you take the reviews, ship them to the client, and

1 then they are integrated onto the Web site. And they did that
2 because that's essentially how their technology worked to begin
3 with; whereas, ours was cloud based.

4 **Q.** Where PowerReviews was talking about its In-Line SEO
5 advantages in 2011, was it your understanding that anything had
6 changed about their product or it was the same as it had been
7 before?

8 **A.** I wasn't aware of any new innovations in their products.
9 The only thing that I was aware of is that, and this goes back
10 to the irritation factor with PowerReviews, is that for some
11 reason they kept claiming that our product didn't do
12 In-Line SEO, which was factually incorrect.

13 **Q.** Did you innovate at any point in SEO in response to
14 customer requests?

15 **A.** Always.

16 **Q.** Was there something different between the U.S. and Europe?

17 **A.** Yes, actually, and that's what led to the innovations
18 around Smart SEO, which was the follow-on product to SVI.

19 **Q.** What was the difference?

20 **A.** So when we came up with SVI, what we were doing is we were
21 taking these reviews, shipping them to the client, and then the
22 client was putting them out to their pages; and they were
23 putting them out to their pages inside a piece of code called
24 the NoScript block. It's a technical issue, but it's a legacy
25 thing actually back from the early '90s.

1 **Q.** NoScript block?

2 **A.** NoScript. Yeah. N-O-S-C-R-I-P-T.

3 And that worked perfectly fine. We had actually talked to
4 Google about that to make sure that when we developed the
5 solution, that that was going to be technically okay with them;
6 and they gave us the green light and said, "No problem."

7 However, in Europe, for some reason that we still don't
8 understand clearly, our clients in Europe felt that having the
9 content in the NoScript block was actually detrimental to their
10 search rankings, and this stemmed -- my understanding was it
11 stemmed from the fact that European retailers actually believed
12 that Google was favoring U.S. search rankings ahead of European
13 search rankings when people did searches; and one of their
14 mythologies around that was it had to do with this NoScript
15 thing.

16 So we started getting feedback from clients in Europe
17 saying, "Hey, we don't like the way your NoScript -- they way
18 you're doing it with NoScript." We never had that feedback, at
19 least I'm not aware of, that feedback coming from anyone in
20 North America.

21 And we went and we hired a consultancy in London, two
22 consultancies, one in London and one in the U.S., to review our
23 solution just so we could have a third-party validation that
24 NoScript -- our NoScript solution worked fine. And, in fact,
25 they essentially concluded the same thing that we had

1 concluded, that it worked.

2 However, we realized that even -- no amount of consultancy
3 was going to erase the skepticism that Europeans had around
4 search rankings. So we went ahead and decided that we needed
5 to get rid of the NoScript piece and come out with a new
6 solution, with a new name that completely erased the whole
7 concept from NoScript from our European customers' minds and we
8 innovated Smart SEO.

9 That wasn't the only thing that we did with Smart SEO,
10 there were some other advantages, but that was one of the major
11 ones.

12 **Q.** Are you able to give an estimate of how much development
13 time it took to develop Smart SEO?

14 **A.** You know, I'm not intimately familiar with that, but I
15 know that we have one product manager devoted to SEO; and, you
16 know, my guess is that it must have been a few months with a
17 couple engineers. I don't -- I can't say authoritatively.

18 **Q.** And was that innovation of SmartSense SEO a result of
19 customer request or of competition with PowerReviews?

20 **A.** Well, Smart SEO, and then as it relates to NoScript, for
21 sure was because of customer -- direct customer request.

22 **Q.** Okay. My last topic for you is syndication of reviews,
23 which Mr. Bonanno asked you about, and he used GX30. I wasn't
24 going to use it so I don't have copies. I'm going to give you
25 your book back.

1 **A.** (Witness examines document.)

2 **Q.** Do you remember he talked to you about some press release
3 from PowerReviews in 2011 about a new free open syndication
4 initiative?

5 **A.** Yeah.

6 **Q.** And then he showed you this email from you to the Sales
7 and CS Teams, and at the beginning you said, quote: (reading)

8 "This week PowerReviews announced their Open Social
9 Commerce Network. We want to provide you with a set of
10 tools to address and clarify the misleading information
11 that is being shared with our clients," closed quote.

12 What did you mean?

13 **A.** So at the time that PowerReviews made this announcement,
14 they also simultaneously sent emails to many of our client
15 contacts and announcing the fact that they wanted to do this,
16 that it was going to be for free; that, you know, it was as
17 good or better than ours, so on and so forth.

18 And what we wanted our sales reps and our client services
19 support team to understand was that, you know, I felt this was
20 just all a marketing exercise that PowerReviews was engaging
21 in, and we needed to make sure that we dispelled any notions
22 that they could do this for free; that it was easy; that, you
23 know, they were going to get the same service that we had,
24 which we felt was misleading to our clients.

25 **Q.** Was it your sense from following PowerReviews that their

1 open syndication initiative was a technological advance or a
2 marketing program?

3 **A.** As far as I could tell, basically it was a marketing and
4 pricing approach.

5 **Q.** In response to PowerReviews' open syndication initiative,
6 did Bazaarvoice commercialize any new product feature?

7 **A.** We didn't commercialize anything in the traditional sense
8 of commercialization where you go through a complete
9 development process, you involve marketing and release it and
10 do announcements, no, we didn't do that.

11 **MR. FELDMAN:** Okay. Thank you. No further questions.

12 **THE COURT:** Mr. Bonanno.

13 **MR. BONANNO:** May I proceed?

14 **THE COURT:** Yes.

15 **REDIRECT EXAMINATION**

16 **BY MR. BONANNO:**

17 **Q.** Mr. Defossé, I'd like to start with the question that
18 counsel asked you about the Amazon Webstore. Do you remember
19 that line of questioning?

20 **A.** Uh-huh.

21 **Q.** And I think it would be helpful if we step back. And
22 eCommerce platform is the technology that a retailer uses to
23 sell products online; right?

24 **A.** That's correct.

25 **Q.** So an eCommerce platform provides the shopping cart

1 functionality; right?

2 **A.** Generally, yes.

3 **Q.** And eCommerce platform also provides order management
4 functionality?

5 **A.** It depends on the eCommerce platform but, yeah, some of
6 them do that.

7 **Q.** Is it fair to say at a generic level that an eCommerce
8 platform is the foundation technology to sell products online?

9 **A.** Yeah. It's the core component, yes.

10 **Q.** And Amazon Webstore is an eCommerce platform offered by
11 Amazon; correct?

12 **A.** Yes, that's correct.

13 **Q.** And there's a number of other eCommerce platforms in the
14 market today; correct?

15 **A.** Yes.

16 **Q.** GSI?

17 **A.** Yes.

18 **Q.** Volusion? I believe it's spelled V-O-L-U-S-I-O-N.

19 **A.** Yes.

20 **Q.** There's a number of other eCommerce platforms in the
21 market; correct?

22 **A.** That's right.

23 **Q.** And Bazaarvoice customers have, that sell products online,
24 have eCommerce platforms; correct?

25 **A.** If they sell online, yes.

1 Q. So Bazaarvoice's products are purchased by a customer and
2 integrate with the eCommerce platform; correct?

3 A. The -- I wouldn't say that in all -- you know, I don't
4 want to respond in the affirmative to integrated, but they are
5 used at the same time. In some cases, they are integrated. In
6 some cases, they may not be.

7 Q. And, so, Amazon provides an eCommerce platform called
8 Amazon Webstore; correct?

9 A. That's my understanding, yes.

10 Q. And this Amazon Webstore platform has some built-in
11 ratings-and-reviews functionality; correct?

12 A. Yes.

13 Q. There are also other eCommerce platforms that have similar
14 functionality; correct?

15 A. Yes.

16 Q. And Bazaarvoice sells its products to customers that use
17 eCommerce platforms that may have built-in ratings-and-reviews
18 functionality; correct?

19 A. That may have, yes.

20 Q. Okay. Isn't it true, sir, that Bazaarvoice offers a
21 ratings-and-reviews product that customers on Amazon Webstore
22 can choose to purchase?

23 A. So I don't know the answer to that. I know that we have a
24 relationship with Webstores to market our solution to the
25 Webstore customers, but I don't know exactly what the offering

1 to those customers is. So I'm not the person to ask.

2 **MR. BONANNO:** Your Honor, I'd like to put up on the
3 screen GX20. I only have one copy in hard copy that I'll hand
4 up to the Court, and maybe we can put it on the screen for the
5 witness. I didn't expect this to come up, so I don't have any
6 other copies right now.

7 **THE COURT:** All right.

8 **MR. FELDMAN:** What number?

9 **MR. BONANNO:** GX20. And we'll put it on the screen.

10 **THE COURT:** Just wait for a moment.

11 **MR. BONANNO:** Yes.

12 **THE COURT:** Is this a document that's been stipulated?

13 **MR. BONANNO:** I'm not quite sure. Let me check on it.

14 **MS. ALEPIN:** There's copies.

15 **MR. BONANNO:** There's copies over there?

16 **MR. BENDER:** It has been stipulated.

17 **MR. HUSTON:** It has, yes, Your Honor.

18 **THE COURT:** Defendants, are you ready to proceed with
19 this?

20 **MR. FELDMAN:** Yes, Your Honor. Thank you.

21 **BY MR. BONANNO:**

22 **Q.** All right. Mr. Defossé, this is a "how the deal was done"
23 email; correct?

24 **A.** Yes.

25 **Q.** And, Savannah, can we please focus in on the lower email?

1 Do you see the line that reads, "Amazon Webstore is a
2 leader in SMB eCommerce"?

3 **A.** Yes.

4 **Q.** This means that Amazon Webstore is an eCommerce platform
5 that's used by small retailers; correct?

6 **A.** Small-medium businesses, yes.

7 **Q.** Okay. And this is a "how the deal was done" email that is
8 announcing an agreement that would allow the Bazaarvoice I
9 believe it's the Express product to be sold to customers using
10 Amazon Webstore; correct?

11 **A.** That's correct.

12 **Q.** Okay. Isn't it also true, sir, that the only customers
13 who can use the ratings-and-reviews functionality that is
14 available through Amazon Webstore are customers that are using
15 Amazon Webstore as their eCommerce platform?

16 **MR. FELDMAN:** Objection. No foundation.

17 **THE WITNESS:** I actually don't know the answer to
18 that. I don't know if eCommerce component is a requirement or
19 not.

20 **BY MR. BONANNO:**

21 **Q.** So as we sit here today, you're not aware of Amazon
22 providing ratings-and-reviews functionality to any customer
23 that is not already purchasing the Amazon Webstore eCommerce
24 platform; correct?

25 **A.** I just have no knowledge of who they sell to and who may

1 or may not be using certain aspects of that product.

2 Q. As we sit here today, sir, do you have any understanding
3 of who owns the data that is associated with ratings and
4 reviews that are collected through the Amazon Webstore
5 eCommerce platform?

6 A. Like I said, I'm not familiar with the details behind
7 Amazon Webstore.

8 Q. I'd like to turn to a document your counsel used during
9 his questioning, GX837.

10 A. (Witness examines document.)

11 Q. Do you have that document, sir?

12 A. Yes, I do.

13 Q. Okay. And I'd like you to please turn to the page that
14 reads "Buddy Media Battle Card."

15 A. Uh-huh, yes.

16 Q. Do you see that?

17 And focus right below positioning statement where there's
18 a sentence that reads: (reading)

19 "Buddy Media is a complementary solution to BV and we
20 have many mutual clients."

21 Did I read that correctly, sir?

22 A. That's correct.

23 Q. When you use the term "complementary" on these battle
24 cards, that means that the company that's listed provided
25 features and functionality that enhanced the value of the

1 products provided by Bazaarvoice; correct?

2 **A.** No, that's not what I mean by that.

3 **Q.** Mr. Defossé, I'd like you to turn to your deposition,
4 please, I believe it was the last exhibit in your binder,
5 page 114:21 -- starting at line 21, I apologize, through 115:4.

6 **A.** (Witness examines document.)

7 **Q.** Are you there, sir?

8 **A.** 115, yes.

9 **Q.** Yes. Sorry. Starting at 114, line 21.

10 **A.** Oh, okay.

11 **Q.** You were asked the question: (reading)

12 **"Q.** So when you say 'the overall solution was more
13 complementary than competitive,' what do you mean by
14 'complementary' there?

15 **"A.** So by 'complementary' again, I mean that it has
16 features and functionality that add to or enhance
17 capability -- have enhanced -- enhanced value compared to
18 what the Bazaarvoice platform offers."

19 Did I read that correctly?

20 **A.** Yes, you did.

21 **MR. FELDMAN:** Objection. He omitted 114, line 4 until
22 line 21, which addresses the same subject matter.

23 **THE COURT:** All right. That's received. Thank you.

24 **BY MR. BONANNO:**

25 **Q.** Let's turn and talk about the Best Buy RFI that counsel

1 asked you about. Do you remember that line of questioning,
2 sir?

3 A. Yeah. I've got it right here.

4 Q. You had mentioned that after Best Buy issued the RFI,
5 Bazaarvoice scrambled to gather information to respond;
6 correct?

7 A. Well, I didn't say "scrambled," but we gathered
8 information.

9 Q. And Best Buy wanted the information that you provided;
10 right?

11 A. I believe so, yes.

12 Q. And you testified that you thought they wanted the
13 information in order to compare Bazaarvoice and PowerReviews;
14 correct?

15 A. That's correct.

16 Q. So they were comparing the products and services offered
17 by the two companies; correct?

18 A. That was my assumption, yes.

19 Q. They wanted that information in order to compare the two
20 firms?

21 A. That's what I assumed, yes.

22 Q. Bazaarvoice wanted to keep Best Buy as a customer; right?

23 A. Yes, no question.

24 Q. So Bazaarvoice provided the information that Best Buy
25 wanted so it could conduct its analysis of Bazaarvoice and

1 PowerReviews; correct?

2 **A.** Yeah. I mean, we responded to the RFI, which we assumed
3 was going to be compared, correct.

4 **Q.** And you knew you were competing against PowerReviews;
5 correct?

6 **A.** That was our assumption, yes.

7 **Q.** I'd like to turn to Government Exhibit 18, which counsel
8 questioned you about, please.

9 **A.** (Witness examines document.)

10 **Q.** In this email you were seeking responses to a survey from
11 Bazaarvoice salespersons regarding competition they were seeing
12 in the field; correct?

13 **A.** That's correct.

14 **Q.** Sir, when you oversaw the product strategy team,
15 Bazaarvoice's sales personnel recorded competition they were
16 encountering in particular accounts in the company's sales
17 force database; correct?

18 **A.** They were told to record the competition in the sales
19 force database.

20 **Q.** And are you aware of any policy, during your tenure as the
21 vice president of the product strategy team, in which
22 Bazaarvoice salespersons were instructed only to record the
23 presence of PowerReviews in competitive sales opportunities?

24 **A.** I don't recall if that happened or not. I don't remember
25 that.

1 **MR. BONANNO:** Your Honor, I don't have any further
2 questions for the witness at this time.

3 The one thing I wanted to raise was I neglected to move
4 several exhibits into evidence during Mr. Defossé's examination
5 that I'd like to offer into evidence now.

6 **THE COURT:** Okay.

7 **MR. BONANNO:** Government Exhibit 28 --

8 **MR. FELDMAN:** Wait. Wait.

9 **MS. ALEPIN:** Wait.

10 (Pause in proceedings.)

11 **MR. FELDMAN:** No objection, Your Honor.

12 **THE COURT:** Okay. Admitted.

13 (Plaintiff's Exhibit GX28 received in evidence)

14 **MR. BONANNO:** Government Exhibit 29.

15 **MR. FELDMAN:** No objection.

16 (Plaintiff's Exhibit GX29 received in evidence)

17 **MR. BONANNO:** Government Exhibit 32.

18 **MR. FELDMAN:** No objection.

19 (Plaintiff's Exhibit GX32 received in evidence)

20 **MR. BONANNO:** And Government Exhibit 1215.

21 **MR. FELDMAN:** No objection to it being admitted into
22 evidence, but there are confidentiality issues for that client.

23 **THE COURT:** Okay. It's admitted.

24 (Plaintiff's Exhibit GX1215 received in evidence)

25 **MR. BONANNO:** No further questions, Your Honor.

1 **THE COURT:** Thank you very much. You may step down.

2 **THE WITNESS:** Thank you, Your Honor.

3 (Witness excused.)

4 (Pause in proceedings.)

5 **MS. SCANLON:** So, Your Honor, with your permission, we
6 would like to offer some video testimony at this time.

7 **THE COURT:** Very well.

8 **MS. SCANLON:** It's George Waltzinger, the
9 vice president of corporate development at Bed Bath & Beyond.

10 **MR. FELDMAN:** Your Honor, just for the record, we've
11 made objections under Federal Rule of Evidence 602 to this
12 testimony on foundation grounds. I have no problem with them
13 showing it. I just don't want to waive those objections, which
14 Your Honor will need to rule on at some point.

15 **THE COURT:** All right. I will deal with those at some
16 point. Thank you.

17 **MR. FELDMAN:** Thank you.

18 **THE COURT:** Okay. I think we're ready, Ms. Scanlon.

19 **MS. SCANLON:** Thank you.

20 (Videotaped was played as follows:)

21 **"Q.** Good afternoon. My name is Travis Chapman, and I
22 represent the plaintiff, the United States, in this
23 matter. I appreciate you taking the time for us today.

24 "Would you please state your full name for the record?

25 **"A.** George William Waltzinger, Junior.

1 **"Q.** And what's your business address?

2 **"A.** 650 Liberty Avenue, Union, New Jersey.

3 **"Q.** Where are you currently employed?

4 **"A.** I'm currently employed at Bed Bath & Beyond.

5 **"Q.** How long have you been with Bed Bath & Beyond?

6 **"A.** Over 22 years.

7 **"Q.** What's your current title?

8 **"A.** Vice president corporate development and president of
9 Harmon stores.

10 **"Q.** How long have you held the title of vice president of
11 corporate development?

12 **"A.** I have held that for at least 10 years.

13 **"Q.** Yeah. Can you just kind of give me an overview of
14 what your job is?

15 **"A.** I head up the Harmon Division, which is a health and
16 beauty company, and I oversee the eCommerce -- eCommerce
17 platforms for Bed Bath & Beyond, and also get involved in
18 a lot of the strategic things within the organization.

19 **"Q.** And Bed Bath & Beyond, what is the company? What
20 does it do?

21 **"A.** Bed Bath & Beyond is a specialty store which sells
22 home and -- home furnishing products. We have multiple
23 divisions which comprise the universe of Bed
24 Bath & Beyond. We have Bed Bath & Beyond. We have Cost
25 Plus World Market. We have Harmon, which is a health and

1 beauty company. We have Buy Buy Baby and then the parent
2 Bed Bath & Beyond.

3 "Q. You mentioned that you head up eCommerce for the
4 company; is that correct?

5 "A. Correct.

6 "Q. What -- in terms of your responsibilities, what does
7 that entail?

8 "A. Multiple responsibilities. Basically all the
9 responsibility for the eCommerce as far as Bed
10 Bath & Beyond is concerned reports up through me, and I'm
11 fully responsible for that concept.

12 "Q. In terms of the eCommerce for Bed Bath & Beyond, what
13 Web sites does that represent?

14 "A. We have BedBathandBeyond.com. We have
15 BedBathandBeyond.ca which is our Canadian Web site. And
16 we have something called the Beyond Store, which is an
17 in-store version of our Web site used by our stores.

18 "Q. You also mentioned that Bed Bath & Beyond has a store
19 called Buy Buy Baby?

20 "A. Correct.

21 "Q. Does Buy Buy Baby have a Web site?

22 "A. Yes, it does.

23 "Q. Are you responsible for that Web site?

24 "A. Yes.

25 "Q. What is that Web site?

1 **"A.** It's Buybuybaby.com.

2 **"Q.** I'm handing you what's been marked as Government
3 Exhibit 561.

4 "I'll represent that I visited BedBathandBeyond.com
5 several days ago and found a page for a coffee maker and
6 printed out a screen shot of that page which resulted in
7 Exhibit 561. Will you please take a look at it?

8 **"A.** Uh-huh.

9 **"Q.** To the best of your knowledge, does Exhibit 561
10 reflect what a typical product page on Bed Bath & Beyond's
11 Web site looks like?

12 **"A.** Yes.

13 **"Q.** You also mentioned that Bed Bath & Beyond sells
14 through Buybuybaby.com. Does Exhibit 561 reflect the
15 general layout of a typical product page on
16 Buybuybaby.com?

17 **"A.** We just relaunched our Buy Buy Baby Web site on
18 Wednesday, so it is similar but not identical. Similar
19 layout.

20 **"Q.** Looking at Exhibit 561, do you see where there's some
21 customer ratings or reviews?

22 **"A.** Yes.

23 **"Q.** Is ratings and reviews a feature that is generally
24 available on the pages of products for sale on
25 BedBathandBeyond.com?

1 **"A.** Yes.

2 **"Q.** Is ratings and reviews a feature that is also
3 generally available on the pages of products for sale on
4 Buybuybaby.com?

5 **"A.** Yes.

6 **"Q.** When were ratings and reviews added to
7 BedBathandBeyond.com?

8 **"A.** 2009.

9 **"Q.** When were they added to Buybuybaby.com?

10 **"A.** I'm not sure.

11 **"Q.** Do you know if they were before or after Bed
12 Bath & Beyond?

13 **"A.** Subsequent to Bed Bath & Beyond.

14 **"Q.** Were you involved in the decision to add a ratings
15 and reviews to the company's Web site?

16 **"A.** I was involved in the decision-making.

17 **"Q.** Can you describe your role in that decision?

18 **"A.** I was one of the final decision-makers whether to put
19 ratings and reviews onto Bed Bath & Beyond.

20 **"Q.** You mentioned you were one of the final
21 decision-makers. Who else was involved in making that
22 decision?

23 **"A.** It was a group of people. I was the ultimate
24 decision-maker.

25 **"Q.** Why did Bed Bath & Beyond add ratings and reviews to

1 its Web site?

2 "A. We thought it would improve conversion.

3 "Q. Looking at it in 2009, was there any competitive
4 implication to Bed Bath & Beyond not having ratings or
5 reviews on its Web site?

6 "A. The competitive environment had -- the competitive
7 environment in 2009 had most -- had ratings and reviews,
8 so we wanted to be similar to them as well.

9 "Q. Did you feel that Bed Bath & Beyond was at a
10 competitive disadvantage without ratings and reviews on
11 its Web site?

12 "A. Yes.

13 "Q. Did Bed Bath & Beyond consider building a
14 ratings-and-reviews solution internally?

15 "A. After 2009, no.

16 "Q. Why not?

17 "A. There were players out there that we thought could
18 actually perform the service better than we could
19 internally develop.

20 "Q. Why didn't you believe that you could internally
21 develop a system like the others had?

22 "A. The cost of -- basically the cost of developing a
23 system like this would have been significant and the
24 economics would show you that the third party would do it
25 as well, if not better, and more economically.

1 **"Q.** When you considered whether or not to build a system
2 in-house, did you consider the ongoing maintenance cost of
3 such a system?

4 **"A.** Yes.

5 **"Q.** How did that factor into your decision, if at all?

6 **"A.** We made a decision based upon looking at all those
7 factors, the capital, the ongoing expense, and also the
8 ability to keep up with what was in the marketplace, and
9 made the conclusion that the third party made the most
10 economical and best prudent decision for our company.

11 **"Q.** When Bed Bath & Beyond made the decision to find a
12 third party to supply ratings and reviews, did the company
13 issue a request for a proposal?

14 **"A.** We issued something called a BRD, business
15 requirements document, to multiple third-party providers.

16 **"Q.** Who did you issue a BRD to?

17 **"A.** I don't recall the exact number or names.

18 **"Q.** Do you recall the names of the companies that
19 responded to your BRD?

20 **"A.** I know -- I know two that did. PowerReviews and also
21 Bazaarvoice.

22 **"Q.** Do you recall the name of any other company that
23 responded to the BRD?

24 **"A.** I do not.

25 **"Q.** Was any other company, besides PowerReviews and

1 Bazaarvoice, seriously considered to supply
2 ratings-and-reviews functionality to Bed Bath & Beyond's
3 Web sites?

4 "MR. BRADLEY: In 2009?

5 "Q. In 2009.

6 "A. We came to the conclusion the two primary players
7 that we would determine that could satisfy our needs were
8 PowerReviews and Bazaarvoice, the key players.

9 "Q. In 2009, were Bazaarvoice and PowerReviews each aware
10 that the other was bidding for your business?

11 "A. I believe so.

12 "Q. Why do you believe so?

13 "A. There was a competitive bidding process going on
14 during that time.

15 "Q. You mentioned a competitive bidding process. Can you
16 describe that to me?

17 "A. It's what we call a business requirement document.
18 We would have actually put that out saying, 'Here is what
19 our requirements are and what our needs are,' and ask
20 different third parties to bid on that proposal.

21 "Q. And both PowerReviews and Bazaarvoice bid on that
22 proposal?

23 "A. I believe so, yes.

24 "Q. Looking specifically at PowerReviews, did Bed
25 Bath & Beyond negotiate with PowerReviews beyond that

1 initial submission?

2 "A. PowerReviews and Bazaarvoice were the final two that
3 we chose to move forward with, and we came to the
4 conclusion that Bazaarvoice was -- was the ultimate
5 winner.

6 "Q. Before you made the decision to go with Bazaarvoice,
7 did you have any discussions with PowerReviews beyond the
8 initial submission?

9 "A. I did not.

10 "Q. Did Bed Bath & Beyond?

11 "A. I believe so.

12 "Q. Why do you believe so?

13 "A. There was a negotiation going back and forth
14 understanding the functionality, understanding the
15 pricing, understanding that the management teams would be
16 there to support our teams, and I was part of the
17 decision-making.

18 "Q. Thank you.

19 "In the summer of 2012, did Bazaarvoice offer to renew
20 its contract with Bed Bath & Beyond?

21 "A. They didn't offer that directly to me.

22 "Q. But did they offer to renew their contract with the
23 company?

24 "A. There was contract negotiations during -- during the
25 summer.

1 **"Q.** Were those contract negotiations related to renewing
2 the contract between Bazaarvoice and Bed Bath & Beyond?

3 **"A.** Correct.

4 **"Q.** Did Bazaarvoice attempt to raise Bed Bath & Beyond's
5 price at that time?

6 **"A.** The initial proposal was much high -- was higher than
7 the original amount.

8 **"Q.** How much higher was Bazaarvoice's initial proposal?

9 **"A.** From a pure dollars perspective increase-wise it was
10 in excess of 30 -- from a dollars perspective, it was an
11 increase of 33 percent.

12 **"Q.** To your knowledge, did the proposal include any
13 increased functionality for Bed Bath & Beyond?

14 **"A.** That proposal, no, except for the ability -- there
15 was some unlimited -- there was not a cap -- there was not
16 a cap on it when it came to the number of reviews we could
17 have on our site.

18 **"Q.** Had there previously been a cap?

19 **"A.** Correct.

20 **"Q.** Was that a change that Bed Bath & Beyond requested?

21 **"A.** I think it was mutually negotiated.

22 **"Q.** Sure. You said that there was a change to the
23 proposal. Did that going to unlimited reviews account for
24 the 35 percent proposed price increase?

25 **"A.** We did not -- we did not believe so.

1 **"Q.** Why not?

2 **"A.** We ended up settling on a much lower amount.

3 **"Q.** What did you end up settling at?

4 **"A.** We ended up settling closer to 11 percent.

5 **"Q.** So Bed Bath & Beyond renewed their contract with
6 Bazaarvoice paying an 11 percent price increase?

7 **"A.** According to our calculations, correct.

8 **"Q.** Do you recall when that contract was signed?

9 **"A.** In the fall of 2012.

10 **"Q.** In light of the initial proposed price increase, did
11 Bed Bath & Beyond seriously consider any other vendors in
12 2012?

13 **"A.** At that time, no.

14 **"Q.** Why not?

15 **"A.** Bazaarvoice was a very good partner; and we figured
16 if we could stay with them, that would be the easiest
17 course for us as long as the economics made sense.

18 **"Q.** Why would staying with Bazaarvoice be the easiest
19 course?

20 **"A.** The cost of moving from one platform to another, the
21 intellectual capital to do so, on our IT side to do so,
22 and the potential of economic costs for hardware and
23 software. So it was an economics -- economic decision and
24 also their service level has been -- was very good.

25 **"Q.** Did Bed Bath & Beyond consider dropping ratings

1 reviews altogether because of the proposed price increase?

2 "A. No.

3 "Q. Why not?

4 "A. The power of the reviews since we've had them on our
5 site since 2009 has shown a -- a very nice benefit to our
6 consumer.

7 "Q. What types of benefits has it shown?

8 "A. It shows impartial views of products that aren't
9 biased by a third party or the company.

10 "Q. Based on your experience, do customers find them
11 valuable?

12 "A. My personal experience, yes, I do.

13 "Q. If Bed Bath & Beyond were to drop ratings and
14 reviews, would you be at a competitive disadvantage?

15 "A. Yes.

16 "Q. Why do you say that?

17 "A. My previous testimony about it being industry
18 standard and the ability for a customer getting an
19 unbiased opinion on the product relates to ultimate sales
20 and a better experience on our site.

21 "Q. You spoke earlier about the fact that Bazaarvoice and
22 PowerReviews were the ones that came back; but, to your
23 knowledge, is it possible that other ratings-and-reviews
24 providers did respond to the BRD to Bed Bath & Beyond?

25 "A. I would think other people did respond. The team

1 came to the conclusion that there were only two players
2 that could satisfy a retailer of our size and that we
3 would feel comfortable with, and the other players were
4 deemed unacceptable to our organization.

5 "Q. So you don't know whether PowerReviews satisfied --
6 offered all the functionality needed by Bed Bath & Beyond
7 in 2009?

8 "A. I keep on telling you the same thing over and over
9 again. PowerReviews and Bazaarvoice were similarly
10 situated when it came to the service level they provided,
11 and it came down to economics, some service-level
12 differences, and the team they were putting on to support
13 us. No other player -- no other player satisfied us the
14 way those two players did back in 2009.

15 "Q. And did you discuss why it was that Bazaarvoice was
16 proposing an incremental increase in fees in 2012?

17 "A. Yeah, that was discussed.

18 "Q. Okay. And what was -- what did you discuss about
19 that?

20 "A. We discussed that it was unfathomable that someone
21 would actually increase our rate based upon a growth rate
22 of 33 percent when the actual structure, the
23 implementation cost, and the cost of maintaining what we
24 had built would in no way near cost 33 percent.

25 "Q. And how did you come to that conclusion that it would

1 not cost 33 percent?

2 "A. If you looked at what -- the services of what was
3 provided, you are looking at the hosting cost, server
4 cost, and you're looking at software costs. Software
5 costs were already -- already installed and developed;
6 hardware costs, inflation actually has gone down; and the
7 labor cost in order to support us, inflation is 2 to
8 3 percent for labor rates. We didn't understand why if we
9 had a 33 percent increase, you are quoting here as far as
10 ratings and reviews, why there would be a corresponding
11 33 percent in increased costs.

12 "Q. Have you done an estimate of what the costs would be
13 of moving from one platform to another in 2012?

14 "A. We always look at every project on an individual
15 basis, and the intellectual capital used to do this
16 project or something else, the added value of the same
17 provider to do a similar -- similar type thing would not
18 be our top priority. Our top priority would be doing
19 something that would actually help service our customers.
20 If we already -- we already have something that does that
21 already, we would not want to do that.

22 "The intellectual capital would be from the IT side
23 and from the business side and from the eCommerce
24 operations side, which would be something that we wouldn't
25 think would be a large benefit for the organization if we

1 already had provided that and it worked well.

2 "Q. So, in your opinion, would an internal
3 ratings-and-reviews system be possible for Bed
4 Bath & Beyond?

5 "A. I would say the economics to do that versus doing
6 what we're doing currently right now would be challenging
7 for us.

8 "Q. And what are those economics?

9 "A. Well, looking at one of your exhibits, we came to the
10 conclusion that it was less than \$192,000 a year. So I
11 think doing something internally would cost probably in
12 excess of that and maintaining it -- maintaining it.

13 "Q. What is the expertise, in your mind, of Bazaarvoice
14 for ratings and reviews?

15 "A. I think Bazaarvoice and PowerReviews were the two
16 players who really understand that industry very well and
17 have seen their clients do pretty well.

18 "Q. So how is it that you come to the conclusion that
19 Bazaarvoice has an expertise in ratings and reviews?

20 "A. We have come to the conclusion that those,
21 PowerReviews and Bazaarvoice, were the two primary
22 third-party providers and that's the conclusion we came
23 to. And you can challenge that if you want, but
24 ultimately that's the conclusion that the -- that the team
25 came up with and that's why we went with them.

1 **"Q.** Since 2009, have you canvassed the market to see if
2 there were any other ratings-and-reviews providers out
3 there?

4 **"A.** I have not.

5 **"Q.** Has anyone on your team?

6 **"A.** I'm sure someone on our team -- people on our team
7 have done that.

8 **"Q.** Have they presented to you on that?

9 **"A.** The team came to the conclusion when we were talking
10 about the Bazaarvoice contract that there were only two
11 players that we would still feel comfortable with. That
12 was PowerReviews and Bazaarvoice. So we decided that
13 Bazaarvoice was the incumbent. We wanted to stay with
14 them and try to move ahead.

15 **"Q.** So let's go back to that in 2012. In 2012, your team
16 presented to you saying that there were still only two
17 providers, PowerReviews and Bazaarvoice; is that what
18 your -- is that your testimony?

19 **"A.** There were still two players at that point in time
20 2003. In the summer of 2012, they are considered one
21 player now, which was not good. And we went down the path
22 of saying, 'Oh, we have an incumbent here. Let's try --
23 let's try and negotiate with this incumbent. We have been
24 happy with their services, been happy with their service
25 team. Let's go down that path.'

1 **"Q.** So wouldn't it be -- wouldn't it be in your best
2 interest to use the presence of a competitive alternative
3 to Bazaarvoice to obtain a lower price?

4 **"A.** You would always like to have competition out there.
5 It helps out the marketplace. And if you only have one
6 competitor out there that you can use as a viable
7 solution, that's not a good position for the company to be
8 in.

9 **"Q.** How have you come to the conclusion that Bazaarvoice
10 is only -- is the only viable solution for your
11 ratings-and-reviews needs?

12 **"A.** In 2009, we went through an RFP. We came to the
13 conclusion then. In 2012, we had discussions about who
14 the players were, and we came to the conclusion that since
15 Bazaarvoice was a Tier 1 player who could help -- help
16 provide us with the service level we expected and their
17 price seemed fair, we'd move ahead with them.

18 **"Q.** And in 2012 you said you discussed the players. Did
19 you discuss Pluck?

20 **"A.** I never said -- I said there wasn't -- in this
21 conversation that we -- we've -- Pluck, I've never really
22 seen nor heard of them, so I'm not sure where you're -- I
23 mean, my team might have heard of them, and they probably
24 came to the conclusion they wouldn't be able to satisfy
25 us. And they came to the conclusion that the two players

1 that could have were Bazaarvoice and PowerReviews. That's
2 the conclusion that the team came up with. You can argue
3 the conclusion is wrong, but that's the conclusion that
4 they came up.

5 **"Q.** So are you sure -- are you -- how did you come to the
6 conclusion that the PowerReviews could service your needs
7 in 2012?

8 **"A.** In 2009 we came to that conclusion that PowerReviews
9 and Bazaarvoice could service our needs. We had a team of
10 people that keep up within the industry of what's going on
11 there. We came to the conclusion those are the two
12 players that can still service us. The other players were
13 deemed not sufficient either by their size or their
14 ability or their team they could put in place or how long
15 they had been in business. We -- we stake our reputation
16 with our customers -- we would stake our reputation of our
17 customers with an inferior product or possibly an inferior
18 product."

19 **MS. SCANLON:** Your Honor, I believe defendants have a
20 portion of the video they want to play as well.

21 **THE COURT:** Excellent.

22 (Videotaped was played as follows:)

23 **"Q.** Did both Bazaarvoice and PowerReviews meet your
24 technical requirements for ratings-and-reviews
25 functionality?

1 **"A.** I don't recall the specifics.

2 **"Q.** Did each of the initial proposals have a price?

3 **"A.** I don't recall.

4 **"Q.** And to your knowledge, did PowerReviews adjust the
5 price that they had initially offered to Bed Bath & Beyond
6 for their services?

7 **"A.** I don't recall.

8 **"Q.** Turning to Bazaarvoice, do you know if Bazaarvoice
9 adjusted the price over the course of the negotiations?

10 **"A.** I don't recall specifics.

11 **"Q.** Do you know if Bed Bath & Beyond discussed the offer
12 they had from PowerReviews with Bazaarvoice in the course
13 of the negotiations?

14 **"A.** I -- I don't know.

15 **"Q.** At that time did you investigate any other potential
16 alternatives to Bazaarvoice for ratings and reviews?

17 **"A.** We were trying to work exclusively with Bazaarvoice.

18 **"Q.** Did you discuss Bazaarvoice's acquisition of
19 PowerReviews during your conversation with the Department
20 of Justice?

21 **"A.** I don't recall specifics about that, about the
22 acquisition, no.

23 **"Q.** And what did you discuss specifically concerning
24 PowerReviews?

25 **"A.** During that conversation, we discussed the -- the

1 idea of whether we thought that there were multiple
2 players out and why we concluded about Bazaarvoice; and we
3 concluded back -- we went back to 2009 when we went
4 through the BRD, that we thought there were -- we put an
5 RFP out for multiple players, and we only came back with
6 two, PowerReviews and Bazaarvoice. And that was the
7 conclusion we had come to again in 2012, and since
8 Bazaarvoice was the incumbent and we wanted to stay with
9 that incumbent.

10 "Q. Okay. And when you say in 2012 you had come to that
11 same conclusion, what did you do to make yourself familiar
12 with whether there were other ratings-and-review providers
13 out there in August of 2012?

14 "A. Me personally, I did not. My -- my staff had done
15 that.

16 "Q. Did they present to you about a company by the name
17 of Pluck?

18 "A. No.

19 "Q. Did they present to you about the -- about a company
20 named Reevoo?

21 "A. No.

22 "Q. So are you -- and did they present to you about a
23 company named Gigya?

24 "A. No.

25 "Q. Are you familiar with the capabilities offered by any

1 of those companies?

2 "A. I am not.

3 "Q. What were the technical requirements that were in
4 that BRD?

5 "A. I don't have specific knowledge of that.

6 "Q. Was syndication a requirement that was in the initial
7 BRD?

8 "A. In 2009?

9 "Q. Yes.

10 "A. I don't know.

11 "Q. You don't know or no?

12 "A. I don't know.

13 "Q. Okay. How about custom -- a custom implementation,
14 is that something that was in the BRD?

15 "A. I don't know.

16 "Q. So in 2009, do you know if syndication was something
17 that PowerReviews offered?

18 "A. I don't recall the specifics of that negotiation or
19 that thought process --

20 "Q. Okay. Do you know --

21 "A. -- in 2009.

22 "Q. -- if a custom implementation was something that
23 PowerReviews offered in 2009?

24 "A. I think you asked that question before, and the
25 answer was I am not sure.

1 **"Q.** Are you aware if there were differences in the
2 functionality offered by PowerReviews and Bazaarvoice in
3 2009? I'm sorry.

4 **"A.** I was not involved in the details of -- of that.

5 **"Q.** Okay. Are you aware if PowerReviews offered all the
6 functionality that Bed Bath & Beyond did in 2009?

7 **"A.** I was not involved in the details of that.

8 **"Q.** So can you describe for me the differences between
9 Bazaarvoice and PowerReviews' services in 2009?

10 **"A.** No.

11 **"Q.** Did you sit in on any meetings with PowerReviews
12 concerning their functionality?

13 **"A.** I don't recall.

14 **"Q.** Did you meet with PowerReviews at any time in 2009?

15 **"A.** I don't recall.

16 **"Q.** Today if you were selecting a ratings-and-review
17 provider, would syndication be something that would be
18 necessary for the providers to offer for Bed Bath & Beyond
19 to go with that specific provider?

20 **"A.** Currently I believe syndication is offered by
21 Bazaarvoice, and we've elected not to -- not to use that.

22 **"Q.** Okay. So, to your knowledge, Bed Bath & Beyond does
23 not employ any -- does not receive syndicated reviews from
24 its manufacturers?

25 **"A.** That is correct.

1 **"Q.** And has Bazaarvoice done any custom implementation
2 for Bed Bath & Beyond?

3 **"A.** I don't know.

4 **"Q.** Okay. Is it possible that they have?

5 **"A.** I'm sure -- anything is possible, sure.

6 **"Q.** After Bazaarvoice provided the initial RFP, they
7 responded to the initial RFP, do you know if Bazaarvoice
8 was told that PowerReviews was also competing for Bed
9 Bath & Beyond's business?

10 **"A.** I don't know if they were specifically told.

11 **"Q.** Have you discussed whether it's possible to syndicate
12 reviews with manufacturers?

13 **"A.** We've had internal discussions and chosen not to do
14 that.

15 **"Q.** In 2009, did you estimate the costs, the initial
16 costs, for building an internal ratings-and-reviews
17 solution?

18 **"A.** 2009, no.

19 **"Q.** Did you estimate the ongoing costs for building an
20 internal ratings-and-reviews solution?

21 **"A.** We came to the conclusion that a third party would be
22 the best solution for us based upon the initial
23 conversations that we had with some of these players.

24 **"Q.** Did you do a cost of -- did you do an estimate of the
25 ongoing costs for an internal build in 2009?

1 **"A.** I don't remember the exact analysis which we put
2 together.

3 **"Q.** Did any engineers participate in the process of
4 estimating -- of determining whether Bed Bath & Beyond
5 could implement an internal ratings-and-reviews solution?

6 **"A.** I don't know.

7 **"Q.** And when did you do that estimate of how much it
8 would cost for an internal build?

9 **"A.** The cost of any implementation is significant; and we
10 came to the conclusion that if the system is already built
11 and we're very happy with it, we already have established
12 since 2009, that was a system that we would have -- we'd
13 want to stay with.

14 **"Q.** Okay. When you say 'significant,' how much are
15 you --

16 **"A.** I told you we didn't do that specific analysis. We
17 didn't think we had to because we were happy with what
18 the -- ultimately what we ended up with was Bazaarvoice
19 and the cost.

20 **"Q.** Have you analyzed technically what Bazaarvoice
21 provides to you?

22 **"A.** I have not.

23 **"Q.** Have you attended any eCommerce trade shows in the
24 last two years?

25 **"A.** Yes.

1 **"Q.** Which ones have you attended?

2 **"A.** I don't recall.

3 **"Q.** ETail West?

4 **"A.** Etail -- I don't -- I have done numerous ones. I
5 don't recall the exact ones.

6 **"Q.** Okay. And at those trade shows, did you encounter
7 any rating-and-reviews providers?

8 **"A.** I don't recall.

9 **"Q.** Since 2009, have you canvassed the market to see if
10 there were any other ratings-and-reviews providers out
11 there?

12 **"A.** I have not. I'm sure someone on our team -- people
13 on our team have done that.

14 **"Q.** Do you know if they met with any other
15 ratings-and-reviews providers to explore the functionality
16 offered by them?

17 **"A.** I don't know that specifically.

18 **"Q.** Okay. Do you know if they met with Pluck?

19 **"A.** I don't know.

20 **"Q.** Do you know if they evaluated Pluck's products?

21 **"A.** I don't know that.

22 **"Q.** Have you ever met with Gigya?

23 **"A.** I don't know.

24 **"Q.** Do you know if they evaluated Gigya's product?

25 **"A.** I don't know.

1 **"Q.** So do you keep abreast of other providers in the
2 ratings-and-reviews sphere?

3 **"A.** I personally do not. I have a team of people that
4 do.

5 **"Q.** And do you ever use the threat of an alternative to
6 get a better deal from your vendor?

7 **"A.** I wouldn't categorize it as a threat; but I think
8 people know that if you put out for an RFP, that more than
9 one person is going to be bidding on this. And the idea
10 of having more than one person in the market is better for
11 competition.

12 **"Q.** Did you tell Bazaarvoice in 2012 that you were
13 putting a contract out for an RFP?

14 **"A.** I don't recall. We didn't send it out for an RFP --

15 **"Q.** Okay.

16 **"A.** -- I don't believe.

17 **"Q.** And in 2012, were there differences in the offerings
18 between PowerReviews and Bazaarvoice that you were aware
19 of?

20 **"A.** I am not aware of the details of what the -- what the
21 differences are, what the functionality is.

22 **"Q.** So did you evaluate PowerReviews' product in 2012?

23 **"A.** We came to the conclusion it would be easier for us
24 organizationally if we were happy with Bazaarvoice, we
25 would -- we'd like to stay with them. They were the

1 incumbent. They satisfied our needs as far as service
2 level, all the things we talked about.

3 "The price originally, which was a 33 percent
4 increase, seemed unjustified. After going back and forth
5 with them, we came to the conclusion of an approximately a
6 11 percent increase. And that's what we came to the
7 conclusion with.

8 "Q. And how did you -- let's talk about that back and
9 forth with Bazaarvoice to get from 33 to 11. What -- what
10 did you tell Bazaarvoice in order to get the price down
11 from 33 to 11?

12 "A. I never had direct contact with Bazaarvoice.

13 "Q. Did you use the presence of competitive alternatives
14 to get the price down from 33 to 11?

15 "A. I did not have direct conversations with Bazaarvoice.

16 "Q. Okay. So is it possible that someone mentioned
17 competitive alternatives in negotiating the price with
18 Bazaarvoice?

19 "A. You are asking me to speculate. I have a tough time
20 speculating. I know that's what you want to hear, but I
21 can't tell you that because I don't know -- I don't have
22 that fact.

23 "Q. In the summer of 2012, did Bazaarvoice offer to renew
24 its contract with Bed Bath & Beyond?

25 "A. They didn't offer that directly to me.

1 **"Q.** But did they offer to renew their contract with the
2 company?

3 **"A.** There was contract negotiations during -- during the
4 summer.

5 **"Q.** Were those contract negotiations related to renewing
6 the contract between Bazaarvoice and Bed Bath & Beyond?

7 **"A.** Correct.

8 **"Q.** Did Bazaarvoice attempt to raise Bed Bath & Beyond's
9 price at that time?

10 **"A.** The initial proposal was much higher -- was higher
11 than the original amount.

12 **"Q.** How much higher was Bazaarvoice's initial proposal?

13 **"A.** From a pure dollars perspective increase-wise, it was
14 in excess of -- from a dollars perspective, it was an
15 increase of 33 percent.

16 **"Q.** To your knowledge, did the proposal include any
17 increased functionality for Bed Bath & Beyond?

18 **"A.** That proposal, no, except for the ability there was
19 some unlimited -- there was not a cap -- there was not a
20 cap on it when it came to the number of reviews we could
21 have on our site.

22 **"Q.** Had there previously been a cap?

23 **"A.** Correct.

24 **"Q.** Was that a change that Bed Bath & Beyond requested?

25 **"A.** I think it was mutually negotiated.

1 **"Q.** You said that there was a change to the proposal.
2 Did that going to unlimited reviews account for the
3 35 percent proposed price increase?

4 **"A.** We did not -- we did not believe so.

5 **"Q.** Why not?

6 **"A.** We ended up settling at a much lower amount.

7 **"Q.** What did you end up settling at?

8 **"A.** We ended up settling closer to 11 percent according
9 to our calculations.

10 **"Q.** So Bed Bath & Beyond renewed their contract with
11 Bazaarvoice paying an 11 percent price increase?

12 **"A.** According to our calculations, correct.

13 **"Q.** Do you know -- does Bazaarvoice perform moderation
14 services for Bed Bath & Beyond?

15 **"A.** Yes.

16 **"Q.** Okay. So if Bed Bath & Beyond has more reviews, will
17 it cost Bazaarvoice more to moderate those reviews?

18 **"A.** There should be an incremental cost, but not a
19 33 percent cost.

20 **"Q.** So what would, in your mind, be if there was a, let's
21 say, 33 percent increase in volume of reviews that
22 Bazaarvoice had to moderate, what would your --

23 **"A.** We ultimately settled at 11 percent. We thought that
24 was still high, but we wanted to get the thing going and
25 move forward so we settled on 11 percent. So we went from

1 33 percent down to 11 percent.

2 "Q. Okay. And at 11 percent is there some cap on the
3 number of ratings and reviews that Bed Bath and -- that
4 Bazaarvoice will be moderating for Bed Bath & Beyond?

5 "A. I don't believe so.

6 "Q. Okay. So it's possible that Bed Bath & Beyond could
7 per review, per moderating review, obtain a lower price
8 with it's new contract?

9 "A. There's part of the business negotiations, which we
10 talked about earlier, where the idea of getting an
11 unlimited amount came out during that discussion --
12 unlimited amount of reviews came out during that
13 negotiations.

14 "Q. Okay. So let's say that Bed Bath & Beyond's volume
15 growth year over year increases 50 percent. Given an
16 11 percent price increase, does that mean that per review
17 Bed Bath & Beyond would be getting a better price?

18 "A. I don't know the economic model for Bazaarvoice; but
19 ultimately they came to the conclusion, knowing the risks
20 of that versus the risks of being even lower, they came to
21 the conclusion that 11 percent was appropriate for them
22 and that's what we settled upon.

23 "Q. Are you aware of what the moderation costs are per
24 review for Bazaarvoice?

25 "A. Not specifically, no.

1 **"Q.** Okay. So you don't know whether an increase in
2 volume growth year over year leads to increased costs or
3 what increased costs would be for Bazaarvoice?

4 **"A.** I don't have insight to the Bazaarvoice model.

5 **"Q.** Do you know if Bazaarvoice incurred any fees for
6 launching Canada for the first time for Bed Bath & Beyond?

7 **"A.** I don't know.

8 **"Q.** And do you know if that was factored into the price
9 that was offered by Bazaarvoice in 192,000?

10 **"A.** I don't know.

11 **"Q.** And before when you said that there were no increased
12 services, are you aware if the Canada implementation would
13 have been an increase -- would have been additional
14 service?

15 **"A.** I don't know."

16 **MS. SCANLON:** Your Honor, with your permission, we
17 have one additional short segment and then we'll be finished.

18 **THE COURT:** Okay.

19 **MS. SCANLON:** Thank you.

20 (Videotaped was played as follows:)

21 **"Q.** Okay. And what did you discuss specifically
22 concerning PowerReviews?

23 **"A.** During that conversation, we discussed the -- the
24 idea of whether we thought that there were multiple
25 players out and why we concluded about Bazaarvoice; and we

1 concluded back -- we went back to 2009 when we went
2 through the BRD, that we thought there were -- we put an
3 RFP out for multiple players, and we only came back with
4 two, PowerReviews and Bazaarvoice. And that was the
5 conclusion we had come to again in 2012, and since
6 Bazaarvoice was the incumbent and we wanted to stay with
7 that incumbent.

8 "Q. Okay. And when you say in 2012 you had come to that
9 same conclusion, what did you do to make yourself familiar
10 with whether there were other ratings-and-review providers
11 out there in August of 2012?

12 "A. Me personally, I did not. My -- my staff had done
13 that.

14 "Q. Okay. And did they present to you about whether
15 there were other options out there in the market?

16 "A. What I was told was that the two players still out
17 there were still -- once again, were PowerReviews and
18 Bazaarvoice, and Bazaarvoice was the incumbent and it was
19 in our best interest to work with those guys and try to
20 get a contract done.

21 "Q. So can you describe for me the differences between
22 Bazaarvoice and PowerReviews' services in 2009?

23 "A. No.

24 "Q. Okay. So how was it you can come to the conclusion
25 that they offered similar services?

1 **"A.** We put out -- like I described before, we put out a
2 BRD, business requirement document; and that business
3 requirement document laid out each one of those factors,
4 the pluses and minuses. And we came to the conclusion,
5 after having that for multiple players, that PowerReviews
6 and Bazaarvoice were the two that potentially could meet
7 our needs, and we went into further negotiations at that
8 time. And we ultimately came to the conclusion that
9 Bazaarvoice was the right player for us.

10 **"Q.** So if Bed Bath & Beyond has more reviews, will it
11 cost Bazaarvoice more to moderate those reviews?

12 **"A.** There should be an incremental cost but not a
13 33 percent cost.

14 **"Q.** Well, what would the -- what would your estimate of
15 the incremental costs, then, be per review, per volume of
16 review increase?

17 **"A.** I wouldn't know that; but looking at the things that
18 were provided to us, that was a fraction of what was being
19 provided. And if they say rate increased based upon that,
20 it seemed preposterous to us.

21 **"Q.** And when did you do that estimate of how much it
22 would cost for an internal build?

23 **"A.** The cost of any implementation is significant; and we
24 came to the conclusion that if the system is already built
25 that we're very happy with, we already have established

1 since 2009, that was the system we would have -- we'd want
2 to stay with.

3 "Q. Okay. When you say 'significant,' how much are
4 you --

5 "A. I told you we didn't do that specific analysis. We
6 didn't think we had to because we were happy with what
7 the -- ultimately what we ended up with was Bazaarvoice
8 and the cost.

9 "Q. So how is it that the economics are such that a
10 third-party provider is better than an internal analysis
11 if you haven't done a cost estimate?

12 "A. The cost of having a third party versus the cost of
13 trying to hire a third party to develop it for us, we -- I
14 would think, looking at the economics of which we were
15 shown here, that it would be more expensive to go down a
16 third party. And I would think that a lot of
17 Bazaarvoice's customers would think the same thing or they
18 wouldn't be doing it as well.

19 "Q. Okay. Have you analyzed technically what Bazaarvoice
20 provides to you?

21 "A. I have not.

22 "Q. Has someone on your team analyzed it for you and
23 reported that analysis to you?

24 "A. There's no analysis of -- there is a summarization of
25 the functionality which Bazaarvoice currently has and

1 offers; and some we take advantage of, some of them we
2 don't. And, so, we have, as an organization, we have an
3 understanding -- we have an understanding of that."

4 **MS. SCANLON:** Thank you, Your Honor.

5 **THE COURT:** Okay, Ms. Scanlon.

6 So we are quarter to 1:00. Do you have 15 minutes or
7 should we break for the day and come back tomorrow at 8:00?
8 What's your pleasure?

9 **MR. HUSTON:** Your Honor, I think it probably makes
10 sense to break for the day.

11 **THE COURT:** Okay.

12 **MR. FELDMAN:** Thank you, Your Honor.

13 **THE COURT:** That's what we'll do. See you tomorrow at
14 8:00.

15 **MR. FELDMAN:** Thank you.

16 (Proceedings adjourned at 12:43 p.m.)

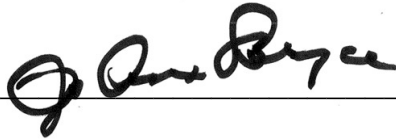
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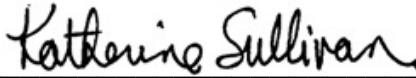
CERTIFICATE OF REPORTERS

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Wednesday, September 25, 2013

A handwritten signature in cursive script, reading "Jo Ann Bryce", written over a horizontal line.

Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
U.S. Court Reporter

A handwritten signature in cursive script, reading "Katherine Sullivan", written over a horizontal line.

Katherine Powell Sullivan, CSR #5812, RMR, CRR
U.S. Court Reporter